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In the Supreme Court of the United States

October Term, 1975

No. 75-

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner

v.

THOMAS W. GRIFFITH and
AMERICAN COMMERCIAL LINES, INC.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Wheeling-Pittsburgh Steel Corporation, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on August 11, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a-23a) is not yet officially reported. The opinion of the United States District Court for the Western District of Pennsylvania (Appendix B, *infra*, pp. 24a-37a) has been reported at 384 F. Supp. 230 (W.D. Pa. 1974). The District Court's original and amended orders are reproduced as Appendices C and D respectively. The judgment of the Court of Appeals is reproduced as Appendix E.

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1975. A timely Petition for Writ of Certiorari may be filed by Petitioner with this Court on or before November 10, 1975. This Court has jurisdiction under 28 U.S.C. §1254(1). The District Court's jurisdiction was based on 28 U.S.C. §1333.

QUESTIONS PRESENTED

In 1972 Congress passed comprehensive amendments to the Longshoremen's and Harbor Workers' Compensation Act ("LSHWCA") which substantially increased the benefits payable by employers to employees under the Act while eliminating employers' liability for damages to employees and for liability to vessel owners for indemnity or contribution.

The questions presented by this Petition are:

1. Does the decision below misconstrue §902(21) and§905 of the amended LSHWCA and upset the careful balance struck by Congress in passing the 1972 amendments by holding an employer liable to an employee for damages beyond LSHWCA compensation merely because the employer was in temporary possession of a vessel not owned by it at the time of the accident?

2. Does the decision below misconstrue §905 of the amended LSHWCA, and is it in direct conflict with this Court's decision in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952), by holding that a vessel owner may obtain contribution from a LSHWCA employer despite the employer's statutory immunity from tort liability?

STATUTES INVOLVED

This case involves the interpretation and application of several sections of the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §901 *et seq.*, as amended in 1972. The sections of the Amended Act primarily involved are set forth below.

§902. Definitions
When used in this chapter—

• • •

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer or crew member.

§905. Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF CASE[1]

I. Factual Background

Respondent, Thomas Griffith, an employee of petitioner, Wheeling Pittsburgh Steel Corporation ("Wheeling"), was injured while loading steel products into a barge owned and operated by respondent, American Commercial Lines, Inc. ("American"), but temporarily in Wheeling's possession. Pursuant to Wheeling's oral request, American had delivered its Barge No. 2730, to Wheeling's landing along the Monongahela River at Allenport, Pennsylvania, on May 23, 1973, three days before the accident. (R.22a). No written charter between American and Wheeling existed. American's Barge No. 2730 was to be loaded with steel products by Wheeling's employees and then moved by American to Louisville, Kentucky.[2]

The accident occurred on May 26, 1973, as Wheeling's employees were attempting to pull one of the barge covers shut. The covers would not slide or roll properly. When a cover suddenly came loose and rolled backwards, Griffith was thrown from the cover and fell several feet into the barge's hopper. (R. 86a-88a; 108a-111a).

During the three days prior to its loading, Barge No. 2730 was moored in the "coal fleet", about a barge length upriver from the loading area. On or about May 25, 1973, the

1. References to material in the Appendix filed with the Court of Appeals will be designated by "R . . . ". References to material included in the record but not in the Appendix will be described with particularity.

2. Deposition of Robert W. Reidel pp. 5-6, 22-23; American's and Wheeling's Answer to Plaintiff's Supplemental Interrogatory; American's Answers to Plaintiff's First Set of Interrogatories Nos. 4, 10; Wheeling's Answers to Plaintiff's First Set of Interrogatories Nos. 6, 7; Wheeling's Answers to American's Interrogatories Nos. 26, 29.

barge was manually maneuvered into loading position using a shore based crane and the river's current.[3]

Wheeling constantly has temporary possession of barges at its Allenport landing, which are owned by various barge companies. Wheeling does not own any barges at the Allenport landing and performs no maintenance or repairs to barges there. If a barge at the landing is in need of repair, the barge owner customarily sends men to the landing to repair it or if necessary the barge is replaced.[4]

American never parts with full command and control over its barges which are temporarily in possession of its customers to be loaded or unloaded. American uses independent towing companies to move its barges to its customers and then to final destination. American has district offices in major ports, *e.g.*, Pittsburgh, Pennsylvania and New Orleans, Louisiana. American makes periodic inspections and repairs of its barges as needed and has personnel in its district offices to inspect American's barges. American's Pittsburgh Maintenance Supervisor inspected Barge No. 2730 shortly before it was delivered to Wheeling. American's Pittsburgh office monitors the location of American's barges in its district on a daily basis. If a shipper temporarily in possession of one of American's barges complains about the condition of a barge, American sends someone to the landing to inspect the barge. On prior occasions—over a twenty-five year period—American sent its personnel to Wheeling's Allenport landing to make repairs to its barges.[5]

3. Deposition of Joseph R. Armstrong, pp. 24-26; 68-69; Wheeling's Answers to American's Interrogatories Nos. 26, 27, 29.

4. Deposition of Charles A. Nedley, pp. 54-56; Deposition of Joseph A. Allfree, pp. 55, 71.

5. Depositions of Frank J. Merritt, pp. 4-11; 35-37; Deposition of William Reidel, pp. 8, 15-24; American's Answers to Wheeling's Interrogatories, Nos. 8, 9, 10. Other barge owners that deliver barges to Wheeling's Allenport landing to be loaded also send their personnel to the landing to repair the barges owned by them. Deposition of Joseph Armstrong, pp. 20, 67; Deposition of Joseph Allfree, pp. 8-9.

American constructed Barge No. 2730 and has used the barge for carrying cargo on the inland waterways of the United States since 1969. American caused independent contractors to perform maintenance and repair work on Barge No. 2730 at least nine times since 1969. After the accident American performed extensive repairs to Barge No. 2730. In the sixty days prior to the accident, American moved Barge No. 2730 to and from twelve cities.[6]

II. Proceedings in the District Court

Griffith filed this action for damages under the Jones Act and the general maritime law against his employer, Wheeling, and American, the owner and operator of the barge.[7] Griffith's complaint alleged that the injury was caused by the negligence of Wheeling and/or American and by the unseaworthiness of American's Barge No. 2730. Both defendants crossclaimed for indemnity or contribution.

Wheeling moved for summary judgment as to Griffith's and American's claims against it. The motions were granted by the District Court.[8] As to the negligence claim, the court reasoned that to permit Griffith to sue his employer for damages under §905(b) of the LSHWCA merely because it

6. American's Answers to Wheeling's Interrogatories, Nos. 1, 2, 10, 13, 16. American's Answers to Plaintiff's First Set of Interrogatories Nos. 6, 10.

7. From the time of the accident until the present date Griffith has been receiving benefits under the LSHWCA from Wheeling at the rate of $121.20 per week for a total of approximately $8,000. Griffith is currently 28 years old. Under 33 U.S.C. §908 and based on his life expectancy of 43 years, he will, if his alleged total disability continues, be entitled, under his current benefits, to collect from his employer $6,302 per year for 43 additional years for a total of $271,800 in benefits under the LSHWCA. Griffith's benefits will increase substantially in the future pursuant to 33 U.S.C. §908. All of this without proof of any fault by Wheeling. See, Vital Statistics of the United States, U.S. National Center for Health Statistics. Plaintiff's Answers to Wheeling's Interrogatories Nos. 1, 34 and 63.

8. The Court of Appeals affirmed the District Court's decision on the Jones Act and unseaworthiness claims, and accordingly, they are not at issue herein.

was temporarily in possession of the barge at the time of the accident would be inconsistent with the primary goal of the 1972 Amendments to the LSHWCA, which it believed were intended to relieve LSHWCA employers from the burden of damage suits in exchange for greater statutory benefits to employees. The District Court further reasoned that Griffith's attempted circumvention of the exclusivity provisions of the LSHWCA was simply inconsistent with the fact that the LSHWCA is a workmen's compensation statute under which an employee receives generous statutory benefits in return for surrendering the right to sue an employer for damages. The District Court also held that the 1972 Amendments [§905(b)] explicitly barred American's claim as a vessel owner for indemnity or contribution from Wheeling, the employer.

III. Decision of the Court of Appeals

The Court of Appeals recognized that the exclusive remedy section of the LSHWCA [§905(a)] was a "compelling construction" which insulated Wheeling from liability and noted that the section's language releasing the employer from "all other liability" could hardly be "plainer". The court recognized that "logic and common sense suggest the literal application of §905(a)". It also recognized that the heart of every workmen's compensation system is the trade-off between the certainty of scheduled benefits and the release of the employer from other liability and that there was no "argument in logic and reason" why an employer which comes into possession of barges should be treated differently from other employers.

Despite the foregoing, in the first appellate construction of amended §905, the Court of Appeals reversed the district court and held that Griffith had a negligence cause of action against his employer under §905(b). The Court of Appeals

held that Congress, as part of the 1972 Amendments, gave a negligence cause of action to a LSHWCA employee against the "vessel". In §902(21) "vessel" is defined to include a vessel's owner, owner *pro hac vice*, agent, operator, charterer or bare boat charterer. Because Wheeling was temporarily in possession of Barge No. 2730, the Court of Appeals held that Wheeling could be found to be an "owner *pro hac vice*" under prior decisions of that Circuit thus coming within the statutory definition of "vessel" and therefore subject to a §905(b) suit even though it was the employer of the injured plaintiff. The Court of Appeals further held that the vessel owner could obtain contribution, but not indemnity, from Wheeling.

REASONS FOR GRANTING THE WRIT

I. THE PETITION RAISES ISSUES WHICH ARE OF GREAT IMPORTANCE TO MANY EMPLOYERS INVOLVED IN THE WATERBORNE COMMERCE OF THE UNITED STATES.

The question of whether a LSHWCA employer[9] which is in temporary possession of a vessel (and under the rationale of the court below an owner *pro hac vice*) at the time of an injury to an employee should be liable for damages in addition to the generous statutory benefits of the amended Act directly affects thousands of employers and employees in all geographic areas of the United States.

An enormous portion of this nation's commerce moves in vessels on inland waterways and coastal ports. In 1973, 1,761.6 million tons of products moved on these waterways. Of total domestic waterborne cargo movement (994.2 million tons) 62.9 percent (625.1 million tons) was moved in barges.[10] As of January 1, 1975 there were 25,515 non-self-propelled vessels operating in the United States. Appendix F, *infra*, pp. 42a-43a.

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9. The broad reach of this Act, and the importance of the issues raised by this Petition arise in part from the very broad definition of "employer" under the Act. If a business entity has "any" employees working in maritime employment in whole or in part, upon navigable waters of the United States, including adjoining piers, wharfs or areas used for loading and unloading vessels it is an employer within the Act. 33 U.S.C. §902(4). The jurisdictional reach of the Act is also extensive, reaching injuries occurring upon the navigable waters of the United States including adjoining piers, wharfs, or other areas used for loading or unloading vessels. 33 U.S.C. §903(a).

10. 5 Waterborne Commerce of the United States 3 (1973), Department of the Army, Corps of Engineers. The principal commodies moved by water are petroleum and its by-products, coal and coke, iron ore and iron and steel, sand, gravel and stone, chemicals, grains and logs and lumber. *Id.* at 11.

These figures demonstrate that an enormous amount of varied products move on this nation's inland waterways in thousands of barges and other non-self-propelled vessels. Under the rationale adopted by the court below every time one of those vessels is in the temporary possession of a business entity, even if for only one day, for loading, unloading or even mooring, an owner *pro hac vice* is created and is potentially subject to suit by an employee for damages for any injury occurring either on the barge or the land adjoining the loading area.

Congress was motivated to amend the LSHWCA in 1972 because of the broad reach and impact of that Act. Congress was aware that more than 270,000 longshoremen and ship repairmen are covered by the LSHWCA and that in 1971 some 68,000 injuries under the LSHWCA involving longshoremen occurred.[11]

Finally, it is clear that the issues in this case will have a direct bearing on a type of litigation that frequently takes place in the federal courts. In each of the years 1969-1974, over 5,000 marine tort actions were commenced in the federal district courts. During each of the years 1968-1974, there were at least 6,700 marine personal injury cases pending in the federal district courts and in four of those years over 10,000 were pending.[12] Congress was clearly concerned with the burden placed on the federal judiciary by tri-party (employee, employer and vessel owner) maritime personal injury suits and intended the 1972 Amendments to the LSHWCA to eliminate such suits.[13]

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11. Hearings on S.2318, S.525 & S.1547 before the Senate Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong. 2d Sess. 1 (1972).

12. Annual Report of the Director of the Administrative Office of the United States Courts, 204, 217 (1974).

13. H. Rep. No. 92.1441, 92d Cong., 2d Sess. (1972); 1972 U.S. Code Cong. and Adm. News, 4703.

These statistics establish that this case is one of importance beyond the interests of these litigants alone. Because of the number of employers and employees covered by the Act and the accident rate in the stevedoring industry, the Third Circuit's creation of a new cause of action will burden the federal courts with a large number of complex and time-consuming tri-party suits and place unjustifiable additional financial burdens on employers involved in waterborne commerce. To avoid these undesirable results and to clarify the meaning of the critical sections of the 1972 Amendments to the LSHWCA, the Court should grant this Petition.

II. THE COURT BELOW ERRONEOUSLY INTERPRETED THE CRITICAL SECTIONS OF THE AMENDED LSHWCA IN A FASHION THAT DENIES THE BENEFITS OF THE AMENDMENTS TO MANY EMPLOYERS AND WILL FOSTER COMPLEX, EXPENSIVE AND TIME-CONSUMING LITIGATION THAT CONGRESS INTENDED TO FORBID.

A. The Decision below will permit damage actions by LSHWCA employees against employers who are in temporary possession of a vessel at the time of the accident thus expanding such employers' liability rather than lessening it as Congress intended.

When Congress enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927, it provided in §905 that an employer's liability for compensation was "exclusive and in place of all other liability" to an injured longshoreman. The wording of that section of the Act has never been changed, and subsection (a) of §905 of the

Amended Act is a verbatim repetition of §905 as it stood in 1927.

There is nothing startling or unusual in this provision. It is typical in any workmen's compensation statute where an injured employee loses his chance to get a large tort verdict in return for a certain recovery of statutory benefits. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 140 (1956) (dissenting opinion).

Although Congress clearly intended that employers be insulated from damages beyond the compensation paid under the Act, that intent, as well as the plain language of §905, were avoided by a series of Supreme Court decisions which ultimately left an employer exposed to damages beyond the statutory compensation paid to an injured employee.[14] In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), a longshoreman was allowed to recover from a shipowner which was not his employer in a third-party action under the doctrine of unseaworthiness. In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), a shipowner was granted full indemnity against an employer for amounts paid on an unseaworthiness claim under *Sieracki* because of the employer's implied warranty of workmanlike service to the shipowner. These two Supreme Court decisions had the effect of eliminating the provisions of §905 which purported to make the compensation liability of an employer its exclusive liability.

The circle was closed for an employer who was also a vessel owner in *Reed v. The Yaka*, 373 U.S. 410 (1963), where a longshoreman was injured by an unseaworthy condition on the vessel, which was under bareboat charter to his employer. Bringing an action *in rem* against the vessel, the longshoreman was awarded damages against his

14. For an excellent history of this line of decisions, see Gilmore and Black, The Law of Admiralty, 438-448 (2d Ed. 1975).

employer/vessel beyond compensation because of the *Sieracki-Ryan* line of cases. Thus, where the employer was also the vessel owner or stood in the place of the vessel owner, the exclusive remedy provisions of the Act did not bar an unseaworthiness action directly against the employer.

Congress was completely dissatisfied with this decisional restructuring of statutory compensation and liability under the LSHWCA.[15]

In an attempt to reverse this trend of expanding liability of both shipowners and stevedoring companies, Congress passed the "most significant and far-reaching amendments"

15. The House Report stated:

> While everyone has agreed since at least the mid-1960's that the benefits under the Act should be raised, there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury.
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> • • •
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> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.
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> • • •
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> The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years. H. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972); 1972 U.S. Code Cong. and Adm. News 4699, 4702-03.

See Landon v. Lief Hoegh and Co., Inc., __ F.2d __, Civil No. 590 (2d Cir., Filed June 18, 1975), for an extensive discussion of the history of the enactment of the 1972 Amendments and the goals Congress wished to achieve.

to the Act since initial passage in 1927.[16] As a tradeoff for increased benefits, the burden of "circular liability law suits" under the *Sieracki-Ryan* line was intended to be extinguished and the employers sole obligation to provide compensation and benefits under the Act was to be re-established.[17]

To restore §905 to its intended vigor and to set aside the judicially created liability system based on the unseaworthiness doctrine, Congress enacted §905(a) and (b). The former §905 was lifted intact and inserted verbatim into the revised Act as subsection (a); afterall, "[t]he language in §905(a) could hardly be plainer: 'The liability of an employer prescribed in Section 904 of this title *shall be exclusive and in place of all other liability of such employer to the employee* . . . ' (emphasis supplied)." *Griffith v. Wheeling-Pittsburgh*, F.2d , (3rd Cir. 1975) (Appendix p.16a). Another subsection, (b), was added to this prior

16. Gorman, the Longshoremen's and Harbor Workers' Compensation Act — After the 1972 Amendments, 6 Journal of Maritime Law and Commerce 1 (1974). The author also notes that "[t]he close relationship of the Longshoremen's Act to the whole body of admiralty and maritime law insures that the 1972 Amendments will have far-reaching consequences in the years ahead. *Id.* at 11.

17. Comment, The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits, 27 Univ. Miami L. Rev. 94, 98 (1972) ("The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 were designed to curtail circular liability while increasing compensation under the act to the injured party. Hopefully, this trade-off will ease the burdens of both employer and employee and re-establish the Longshoremen's and Harbor Workers' Compensation Act as a viable piece of legislation."); Theis, Amended Section Five of the Longshoremen's and Harbor Workers' Compensation Act, 41 Tenn. Law Rev. 773, 775 (1974) ("Thus, the goal of the amendment seems to have been to increase compensation benefits for the worker, while concomitantly decreasing the potential tort liability of both the shipowner and the stevedoring company."); Gorman, The Longshoremen's and Harbor Workers' Compensation Act — After the 1972 Amendments, 6 Journal of Maritime Law and Commerce 1, 11-22 (1974).

provision to over-rule the circular liability decisions by this Court:

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. 33 U.S.C. §905(b).

Subsection (b) has the effect of eliminating the *Sieracki* third-party cause of action for unseaworthiness by the longshoreman against the vessel and of eliminating the *Ryan* cause of action by the vessel owner against the stevedore. In their stead, a new negligence third-party cause of action was created as the exclusive remedy of a longshoreman against a "vessel". The elimination of the unseaworthiness remedy had the effect of insuring that an employer's exclusive liability under the Act would be the scheduled compensation. The *Sieracki-Ryan* line of cases were based on the unseaworthiness cause of action by the employee against the vessel owner who in turn was indemnified by the employer. Once the underlying unseaworthiness remedy was eliminated the device used to circumvent old §905 [new §905(a)] was also eliminated.

Congress was concerned, however, with providing that longshoremen who were employed directly by the vessel owner, rather than an independent contractor or other entity, would not be deprived of a cause of action for

negligence. As the vessel owner would also be the employer of the injured longshoreman in this situation, Congress recognized the need for special provisions to grant such an employee a cause of action without disrupting the overall goal of limiting an employer's liability. The House Report states:

> The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), [sic] held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. H. Rep. No. 92-1441, 92d Cong. 2d Sess. (1972); 1972 U. S. Code Cong. & Adm. News 4705.

The longshoreman's cause of action for negligence is granted against the "vessel", a term inserted in the Act for the first time in 1972 and defined in §902(21) to include the "vessel's owner, owner *pro hac vice*, agent, operator, charter [sic], or bare boat charterer. . . ." Wheeling did not own Barge No. 2730 and had not chartered the vessel from American. However, it was in temporary possession of the barge as a bailee at its steel mill landing to load the vessel with cargo which American, the barge owner, would then move to Louisville. Based upon this temporary possession, the Third Circuit found — as Wheeling conceded — that Wheeling could be an owner *pro hac vice* of the vessel under the "temporary possession" test in the Third Circuit's decision in *Blair v. United States Steel Corp.*, 444 F.2d 1390

(3rd Cir. 1971) (Per Curiam), *cert. denied*, 404 U.S. 1018 (1972). However, Wheeling never conceded that it could be found to be the owner *pro hac vice* of Barge No. 2730 under prior Supreme Court decisions or under the meaning that Congress intended to give that term in §902(21).

Blair equates owner *pro hac vice* status with mere temporary possession of a barge; nothing more in terms of ongoing control of the vessel is required under that decision. The legislative history regarding the definition of "vessel" in the amended LSHWCA, prior Supreme Court decisions and common sense and logic strongly suggest that Congress intended the term "owner *pro hac vice*" to have a far more restrictive meaning than the decision below suggests.

As the House Committee Report indicates, Congress was thinking of the situation in *Reed v. The Yaka, supra*, in providing a cause of action against a vessel owner that employed its own longshoremen and obviously granted the cause of action against the "vessel" to reach the situation presented in that case. In *Reed v. The Yaka, supra*, the Court stated:

> Pan-Atlantic was operating the Yaka as demisee or bareboat charterer from Waterman. Under such arrangements full possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner *pro hac vice*. 373 U.S. at 412.

This Court had previously held, "[t]o create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command and navigation' thereof to

the demisee." *Guzman v. Pichirilo*, 369 U.S. 698, 699 (1962).[18] The requirement that full possession, control, command and navigation of the vessel must pass to another for a period of time to create the status of owner *pro hac vice* has long been the law.[19]

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18. Indeed one astute district court within the Third Circuit had perceived and then articulated these requirements in a factual situation virtually identical to the one presented by this petition. In *Miller v. Union Barge Line*, 299, F. Supp. 718, 720 (W.D. Pa. 1969), the court held:

> While the comparison between large ocean going vessels and unmanned and unpowered river barges is far-fetched, nevertheless, we attempt to apply the same admiralty principles, and we cannot find that the delivery of a loaded barge to a stevedoring company for unloading amounts to the condition of being "tantamount to, though just short of, an outright transfer of ownership" described in *Guzman v. Pichirilo*, supra, p. 700, 82 S.Ct. p. 1096.

The Third Circuit has cited *Miller v. Union Barge Line* favorably in *Rao v. Hillman Barge & Construction Co.*, 467 F.2d 1276, 1277 (3d Cir. 1972) stating that the "relationship necessary for application of the doctrine of ownership *pro hac vice* is ordinarily that of bare boat charterer-shipowner [which is] distinquishable from the stevedore-shipowner relationship, *Miller v. Union Barge Line* . . . ." Professors Gilmore and Black make clear that to create an owner *pro hac vice* of a vessel there must be a demise of the vessel when they state "[t]he most important consequences of the distinction between the demise and the other forms of charters flow from the fact that the demise charterer is looked on as the owner of the vessel *pro hac vice*." Gilmore and Black, the Law of Admiralty 242 (2d Ed. 1975). Not only did the Third Circuit ignore the wisdom of prior decisions of this Court, *Miller v. Union Barge Line* and Gilmore and Black when it decided *Blair*, it has now repeated the error in a context that threatens to contaminate an important federal statute.

19. See *e.g.*, *United States v. Shea*, 152 U.S. 403, 406 (1894). ("Charterers of freighters may become the owners for the voyage without any sale or purchase of the ship, as in cases where they hire the ship and have by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage, as, for example, to carry a cargo from one port to another, the arrangement in contemplation of law is a mere affreightment sounding in contract and not

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The clearest expression of what Congress intended by the definition it chose for "vessel" is in the House Report which states:

> *Vessel would be defined as any vessel upon which or in connection with which any person entitled to benefits suffers injury and including the vessel owner and others responsible for the operation of the vessel.* (emphasis added). H. Rep. No. 92-1441, 92d Cong. 2d Sess. (1972); 1972 U.S. Code Cong. and Adm. News 4719.

The foregoing paragraph demonstrates that Congress intended the defined term "vessel" to include only the actual owner and persons responsible for the operation of the vessel. That is, Congress clearly had in mind the traditional concept of owner *pro hac vice* set forth in *Reed v. The Yaka*, *supra*, and the other cases and authorities cited at pages 19-21 of this brief.

The record contained no evidence from which Wheeling could possibly be found to be the demise charterer of American's Barge No. 2730. Wheeling had possession of the

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a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. . . ."); *Leary v. United States* 81 U.S. 756 (1872) ("If the charterer party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. . . . All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage of the service mentioned. The retention by the general owner of such command, possession and control is incompatible with the existence at the same time of such special ownership in the charterer."); *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670 (5th Cir. 1971); *The Norland*, 101 F.2d 967, 971 (9th Cir. 1939) ("The test of whether a charter is a complete demise of a vessel so as to make the charterer owner *pro hac vice* is whether entire command and possession of the vessel, and consequent control over its navigation, has been surrendered to the charterer.")

barge for only a few days and for the limited purpose of loading it with steel products. American delivered the barge to Wheeling and took the loaded barge to Louisville, Kentucky. The limited movements of the barge by Wheeling consisted of manually maneuvering it approximately a barge length down river and then turning it around, during which it moved only a few feet in the river.[20] American had transferred the barge from and to twelve cities in the sixty days prior to the accident. American repaired the barge on numerous occasions in diverse locations since first putting it in service in 1969. After the accident American repaired the barge at Jeffersonville, Indiana. This is far from the relinquishment of "possession, command and navigation" or virtual transfer of ownership required by *Guzman v. Pichirilo, supra*.

By engrafting its expansive, albeit erroneous, concept of owner *pro hac vice* (temporary possession equals ownership) onto the LSHWCA the court below has enlarged what was intended to be a limited exception to an employer's exclusive compensation liability into a potential monster that will contaminate the LSHWCA and defeat its principal purpose. Many of the employers subject to the Act, especially those on the inland waterways, are continually in temporary possession of barges owned by common carriers and thus under the rationale of the court below are "vessels" and subject to suits for damages by their employees.

The decision below will also render impossible a uniform nationwide treatment of employers and employees subject to Act. Longshoremen in ocean port cities who work on large vessels manned by crews will not be able to take advantage of the cause of action created by the decision

20. Deposition of Joseph R. Armstrong, pp. 25, 69.

below because stevedoring companies do not take possession of such large vessels to load or unload them. Ocean port stevedoring companies cannot therefore become owners *pro hac vice* even under the "temporary possession" test adopted by the court below and will be obligated only to pay LSHWCA benefits to injured employees. Companies operating businesses on the inland waterways which depend on barges to provide raw materials or ship finished products will constantly be in temporary possession of barges at landings, be owners *pro hac vice* and be forced to pay large damage awards to employees. Indeed, in certain ports, such as New York, Philadelphia and New Orleans where ocean going vessels and non-self-propelled vessels are both located, the decision below will result in disparate treatment of employees and employers located in the same city. Any decision that establishes such a dicotomy and creates a privileged class of employees and disadvantaged class of employers is of dubious validity.[21]

21. The absurdity of the result reached by the court below can be highlighted by realizing that the holding transforms a steel mill laborer who spent 97% of his work time on the land into the virtual equivalent of a Jones Act seaman. The legislative history is explicit that Congress intended the traditional "admiralty concept" of comparative negligence would apply to the longshoremen's negligence damage action. The history also dictates the application of the "admiralty rule" which precludes the defense of assumption of the risk. These concepts are of course the hallmark of a Jones Act cause of action. The district court relied upon this argument in dismissing plaintiff's claim (Appendix pp. 35a-36a) but the court below rejected it because it perceived that Congress intended a uniform maritime, land based standard as to proof of negligence to apply to §905(b) suits. Appendix p. 15a. It is submitted that the district court was the more perceptive. One maritime law treatise has forcefully urged the federal courts to "hold that Jones Act (and FELA) concepts of negligence apply to harbor workers' actions under §905(b)." Gilmore and Black, The Law of Admiralty, 453 (2d Ed. 1975). These leading admiralty experts continued:

> If the courts fashion the §905(b) action in the image of the Jones Act action, they will find helpful precedents for most of the problem that will arise in litigation. *If they do so, the LHCA harbor workers will be substantially in the position of the Jones Act seaman* (with

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B. The decision below that a vessel owner can obtain contribution from a LSHWCA employer is in direct conflict with two prior decisions of this Court, disregards the plain wording of the statute and the legislative history of the Act and obliterates Congress' principal goal in enacting the 1972 Amendments.

The Court of Appeals, having decided that Wheeling was potentially liable to its employee because it was an owner *pro hac vice* of the barge, went on to reverse the lower court's ruling that the owner of the vessel could not obtain contribution from the employer (Wheeling).[22] This result was of course inevitable as the decision below had created two owners of the vessel in question — an owner *pro hac vice* and a real owner — who were potentially liable to the plaintiff and some manner of allocating their respective liabilities had to be invented.

Congress made its intent to prohibit a vessel owner from obtaining contribution or indemnity from the employer explicitly clear. Indeed, the elimination of such complex and time consuming tri-party actions was the primary purpose of the 1972 Amendments. The statutory language is clear:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and *the employer*

compensation benefits substituted for maintenance and cure) except that the harbor workers will not be entitled to recover under the no-fault fringes of the unseaworthiness doctrine. If the courts do not do that, the §905(b) U.S.C.A. annotations will in time rival the Jones Act annotations. *Id.* at 455.

22. The Court below affirmed the district court's holding that American's indemnity claim was explicitly barred by §905 (b) of the LSHWCA.

> *shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.* 33 U.S.C. §905(b) (emphasis added).

The House Report is no less explicit:

> The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the seaworthiness doctrine.
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>
> *Accordingly, the bill expressly prohibits such recovery, whether based on an implied or expressed warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.*
>
> Under the proposed amendments the vessel may not by contractual agreement or otherwise require the employer to indemnify it, *in whole or in part, for such damages.* (emphasis added) H. Rep. No. 92-1441, 92d Cong. 2d Sess. (1972); 1972 U. S. Code Cong. and Adm. News 4704-4705.

It could not be clearer that an employer subject to the Act cannot be called upon to indemnify or pay contribution to a vessel owner.[23] The House Report specifically says

23. This Court has indicated its awareness of the intent of Congress in this regard. *Cooper Stevedoring Company, Inc. v. Fritz Kopke,* 417 U.S. 106, 113 n. 6 (1974):

> Under the 1972 Amendments, an employee injured on a vessel can bring an action against the vessel for negligence, but the vessel's liability will not be based upon the warranty of seaworthiness or breach thereof. And where the vessel has been held liable for the

(continued)

". . . in whole or in part for such damages" thus ruling out any argument that contribution is somehow permitted.

The decision below in awarding contribution against a LSHWCA employer is in direct and irreconcilable conflict with the decisions of this Court in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952) and *Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972). In both *Halcyon* and *Atlantic* an employee sued a third-party for

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negligency, "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U.S. Code, Sec. 905 (b) (Supp. II 1972). The intent and effect of this amendment was to overrule this Court's decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 A.M.C. 698 (1946), and *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 1956 A.M.C. 1 (1956), insofar as they made an employer circuitously liable for injuries to its employees, by allowing the employee to maintain an action for indemnity against the employer.

Every other court that has considered this argument advanced by American and accepted by the Court of Appeals has rejected it as dead wrong. *Lucas v. "Brinknes" Schiffahrts Ges.*, 379 F. Supp. 759 (E.D. Pa. 1974), appeal dismissed No. 75-1223 (3d Cir. 1975), *cert. denied*, ___ U.S. ___ (Oct. 6, 1975); *Travelers Insurance Co. v. United States*, 493 F.2d 881 (3d Cir. 1974) (dictum); *Landon v. Lief Hoegh and Co., Inc.*, ___ F.2d ___, Civil No. 590 (2d Cir., Filed June 18, 1975) (dictum); *Addison v. Bulk Food Carriers, Inc.*, 489 F.2d 1041 (1st Cir. 1974) (dictum); *Corrao v. M/V Act III*, 359 F. Supp. 1160, 1166 (S.D. Fla. 1973). So too, have the scholars. Gorman, The Longshoremen's and Harbor Workers' Compensation Act - After The 1972 Amendments, 6 Journal of Mar. Law and Commerce 1, 15, 19 (1974) ("Furthermore, the amendments restored the exclusive liability provision of the Longshoremen's Act by declaring 'void' any agreements or warranties making the employer liable for damages recovered against a vessel owner. . . . Vessel owners accustomed to shifting liability through the implied warranty of workmanlike performance will push for contribution among joint tort-feasors, a principal heretofore limited by *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.* to collision cases. The vessel owners will have an uphill battle, for the Supreme Court's recent decision in *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc.* while limiting the Halcyon doctrine in some respects, reiterated that there is no contribution if the party against whom it is sought is statutorily immune from tort liability"); Theis, Amended Section Five of the Longshoremen's and Harbor Workers' Compensation Act, 41 Tenn. Law Rev. 773, 792 (1974) ("It does clearly eliminate the shipowner's indemnity suit against the contractor, making statutory workmen's compensation the employee's exclusive remedy against his employer".).

negligence who in turn sought contribution from the employer. In both cases this Court held that contribution could not be obtained from a LSHWCA employer. In its recent decision in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) this Court held that *Halcyon* did not apply to the situation where the party against whom contribution is sought is not statutorily immune from tort liability. In so doing the Court reaffirmed the wisdom and validity of *Halcyon* where a statutory tort immunity exists, stating:

> These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 Amendments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy. 417 U.S. at 113.

The provisions of the LSHWCA upon which *Halcyon* and *Atlantic* were based were not altered in any way by the 1972 Amendments. *Halcyon* and *Atlantic* are still good law and the decision below is an unwarranted departure from them.[24]

In recognizing a right of contribution against a LSHWCA employer in the absence of a contractual basis, the decision below is in direct conflict with the decisions of the Fifth Circuit Court of Appeals in *White v. Texas Eastern*

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24. In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, *supra*, this Court expressly reserved decision on this question:

> This suit was commenced prior to the enactment of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. §§901-944 (1970 ed., Supp. II), and all parties agree that the amendments are therefore not applicable. Accordingly, we need not decide whether Sessions' suit against the Vessel or the Vessel's third-party complaints against Cooper or Mid-Gulf [the employer] could be brought under the Act, as amended. *See* §905(b). 417 U.S. at 107 n.1.

Transmission Corp., 512 F.2d 486 (5th Cir. 1975), *Petition for Cert. Filed sub nom. Bettis Corp. v. Charles Wheatly Co.*, (U.S. Sept. 24, 1975) (No. 75-472); *Aetna Casualty & Surety Co. v. Service Contracting, Inc.* 490 F.2d 299 (5th Cir. 1973); *Ocean Drilling and Exploration Co. v. Berry Bros. Oilfield Service, Inc.*, 377 F.2d 511 (5th Cir. 1967) *cert. denied*, 389 U.S. 849 (1967). While these are all pre-amendment cases they explicitly hold that old §905 [re-enacted without any change as new §905(a)] is an absolute bar to holding a LSHWCA employer liable for indemnity or contribution under maritime tort principles.

From its enactment in 1927 until the comprehensive amendments in 1972, the LSHWCA underwent a long series of court interpretations that created results inconsistent with the original legislative intent and ultimately produced widespread dissatisfaction in industry, labor and Congress which culminated in the 1972 Amendments. Only the phrase *deja vu* can describe the decision below. All of Congress' work to re-establish the integrity of the LSHWCA has been jeopardized by the first appellate construction of the critical sections of the Amended Act.

It would be unwise for this Court to deny this petition to await the benefit of the wisdom of several appellate decisions. One important aspect of the decision is in direct conflict with prior Supreme Court decisions. The consequences of the other aspects of the decision below are far reaching and immediate. Many new lawsuits will undoubtedly be filed and crossclaims asserted. Substantial private and judicial resources will be expended in such litigation. Faced with the decision below, employers who had believed their liability limited to statutory compensation will have to procure additional insurance, amend existing insurance arrangements, or face uninsured liability. Insurers will be required to adjust rates to reflect this new risk. These consequences should be avoided.

Finally, the granting of this Petition and the rendering of a *definitive* interpretation of §905(a) and (b) would be completely consistent with this Court's historical interest in maritime law generally and the LSHWCA specifically, as well as with this Court's duty to give the lower federal courts proper guidance in the application of important areas of federal law.

Respectfully submitted,

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Appendix

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 75-1022

THOMAS W. GRIFFITH

v.

WHEELING-PITTSBURGH STEEL CORPORATION
and AMERICAN COMMERCIAL LINES, INC.

THOMAS W. GRIFFITH, Libellant above named,
and AMERICAN COMMERCIAL LINES, INC.,
Respondent above named,

Appellants

(Civil Action No. 73-706)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued June 5, 1975

Before SEITZ, *Chief Judge*, ALDISERT and GIBBONS, *Circuit Judges*

OPINION OF THE COURT

(Filed August 11, 1975)

GIBBONS, *Circuit Judge*

This appeal presents us with issues of first impression concerning the proper construction and application of the negligence remedy created by §18(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1263, 33 U.S.C. §905(b),

amending §5 of the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, §5, 44 Stat. 1426, 33 U.S.C. §905 (LHWCA). Because we believe that the district court misapplied §905(b) of the 1972 amendments in the action below,[1] we reverse and remand for further proceedings.

I. The Undisputed Facts.

Appellee Wheeling-Pittsburgh Steel Corporation (Wheeling) operates a steel mill along the banks of the Monongahela River at Allenport, Pennsylvania. It first employed appellant Thomas Griffith on February 11, 1973, about four months before the date of the injury that was to become the subject of this action. He worked out of a common labor pool in the construction department and was assigned on a daily basis to a variety of land-based jobs. On April 1, 1973 Griffith bid into the hot mill labor pool where as before, he was assigned to various jobs on a daily basis. As part of this pool he was assigned to work at the company's barge landing on the river for a total of 3¾ days including the date of the accident on May 26, 1973.

On that day, plaintiff was assigned to work with the barge crew at the landing to assist in the loading of two barges. The barge on which the accident was to occur, No. 2730, was owned by defendant-appellant American Commercial Lines, Inc. (American). Three days earlier, on May 23rd, it had been delivered to Wheeling and was incorporated into the latter's "coal fleet" to await future use. On May 25th, No. 2730 was relocated next to the seawall at the barge landing to take on a load of sheet steel which was destined to move down river to Louisville, Kentucky. A second barge, described as a pipe barge, was positioned next to No. 2730, and it too was to be loaded. The pipe barge was positioned immediately next to the seawall, and No. 2730 was lashed alongside further out on the river.

1. Griffith v. Wheeling Pittsburgh Steel Corp., 384 F. Supp. 330 (W.D. Pa. 1974).

On the morning of the day of the accident, Griffith and the regular rivermen in the barge crew first loaded pipe into the pipe barge. During the loading of the pipe barge, which was completed before noon, Griffith worked on the seawall and barge. No. 2730 was then moved into position for loading by a procedure known as "rounding" in which a crane on the seawall pushed the barges away from the wall permitting the current to turn the boats around in the water so that No. 2730 was situated next to the seawall. Griffith's sole assistance during the procedure involved his throwing ropes from one barge to the other.

The crew then turned to the loading of No. 2730. At that time, Joseph Allfree, the crew's foreman, who was employed as river foreman by Wheeling, became aware that the barge covers were difficult to move. The wheels and track mechanism on which the covers ordinarily roll were without lubrication and were rusty and bent. At about 2:00 p.m. Allfree directed the crew to stop loading the barge and to close the covers. Allfree then returned to his office away from the area. The only other experienced riverman on the crew, Joseph Armstrong, then had difficulty closing one of the covers. A cable was attached from the crane on the seawall to the cover to pull it shut; a second cable was attached to an adjacent cover for leverage. Because eyelets on the stuck cover were missing, the hook at the end of the cable was attached to the lip on the underside of the cover. Both Armstrong and plaintiff were standing on top of the stuck cover when tension was applied to the cable. As the stuck cover began to rise they stepped back onto an adjacent cover, but that cover moved backward and the two men fell into the hold and both were injured.

II. Procedural History and Decision Below.

Griffith filed an action in August, 1973 against both his employer Wheeling, and against the vessel owner American.

He alleged negligence on the part of both, and the unseaworthiness of the vessel. Both defendants denied liability to Griffith, and each cross-claimed against the other for indemnification or contribution. Each defendant then filed a motion for summary judgment in its favor against Griffith, and against each other on the cross-claims. The district court concluded: (1) that Griffith was performing stevedoring duties when injured and was not a seaman; (2) that Wheeling, in possession and control of barge No. 2730, was a vessel owner *pro hac vice;* (3) that the 1972 amendments precluded a claim for unseaworthiness by a longshoreman performing stevedoring duties against the vessel owner; (4) that the 1972 amendments permitted a longshoreman covered by the Longshoremen's and Harbor Workers' Compensation Act to sue the vessel owner for negligence; but (5) that the longshoreman could not sue the vessel owner *pro hac vice*, Wheeling, who employed him to perform stevedoring duties for negligence; and, that (6) American was not entitled to indemnification or contribution from Wheeling. Thus Griffith was left with his workmen's compensation claim against Wheeling, and a negligence action against American.

Both Griffith and American jointly appeal the order granting Wheeling's motion for summary judgment. The district court having determined that the order be entered as a final judgment pursuant to Rule 54(b), Fed.R.Civ P., we have jurisdiction to entertain this appeal, although Griffith's negligence action against American is still pending.

III. Griffith's Status as a Seaman.

Griffith argues for relief on alternative grounds. On the one hand he contends that he was entitled to sue Wheeling his employer since he was a member of the crew of the barge when he was injured, and thus was a seaman entitled to a Jones Act remedy against Wheeling and an action for

unseaworthiness against both Wheeling and American. On the other hand he argues that if he was not a seaman, he was a longshoreman within the protective scope of the LHWCA, and entitled to a §905(b) negligence remedy against Wheeling as owner *pro hac vice* of the vessel, and American, the vessel owner. We will first consider the merits of Griffith's contention that he was a Jones Act "seaman."

The district court, after reviewing the deposition testimony of Griffith and other members of the barge crew, concluded that there was "no evidentiary evidence whatsoever . . . to support a finding that the plaintiff was a seaman when injured . . . .", and so granted summary judgment against Griffith and in favor of Wheeling on the Jones Act claim. 384 F.Supp. 235.

With respect to the propriety of summary judgment on the issue of seaman status, a leading treatise states:

> "The determination of whether the plaintiff is a seaman under the Jones Act should not be taken from the jury by the trial judge if there is an evidentiary basis for making a finding. When conflicting inferences may be drawn from undisputed underlying facts the determination of whether an individual is a seaman must be made by the factfinder. *Only when there is no evidentiary basis to support a jury finding that a plaintiff was a seaman when injured, can the court's decision of summary judgment for the defendant be sustained as a matter of law.* The standard of review where summary judgment has been granted is strict; the record must negate the probability that evidence calling for a contrary result might be developed at the trial." 2 M. Norris, The Law of Seamen §684, at 297-98 (3d ed. 1970) (footnotes omitted) (emphasis supplied).

See also 6 J. Moore, Federal Practice ¶ 56.17[1], at 2464 (2d ed. 1974).

Griffith argues that there was evidence in the record which indicates that at the time of the accident he was doing seaman's work, and points to the following facts as indicia of his seaman status: he was substituting for permanent employees designated as rivermen; his duties included those of a seaman's, he was dressed like a seaman; he received the same rate of pay; he was working on a navigable river when injured; and he was supervised by experienced river workers. (App. at 129a-32a). But these facts standing alone, do not preclude summary judgment. The district court correctly identified the decisive elements necessary of proof in determining who is "a member of a crew" within the meaning of the Jones Act:

> "(a) that the ship be in navigation; (b) that there be a more or less permanent connection with the ship; and (c) that the worker be aboard primarily to aid in navigation." 2 M. Morris, The Law of Seamen §668, at 301 (3d ed. 1970).

See 1A Benedict on Admiralty §21, at 2-15 (7th ed. 1973). The district court concluded that "the vessel upon which Griffith was injured was not in navigation, Griffith had no permanent connection whatsoever with the vessel, and Griffith was not aboard primarily to aid in navigation." 384 F.Supp. at 235. While this holding misinterpreted the "in navigation" requirement, the first point above, as we shall discuss below, we agree that in the affidavits and depositions on file which make up the record, there is no evidentiary basis which could support affirmative findings with regard to the other two elements, and so affirm the granting of summary judgment against Griffith on the question of his "seaman" status.

As properly construed, the "in navigation" requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of

commerce or transportation on navigable waters. 2 M. Norris, *supra*, at 301. Indeed, so long as the vessel is upon navigable waters, an injured Jones Act seaman may recover for injuries suffered while on the wharf. *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370 (1957); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943). Case law indicates that a vessel is "in navigation" although moored to a pier, in a repair yard for periodic repairs, or while temporarily attached to some object. 2 M. Norris, *supra*, at 301-02, and cases cited therein. That the barge is also a "vessel" within the meaning of the Jones Act is also clear. In per curiam opinions reversing dismissals of Jones Act actions, the Supreme Court has extended that remedy so as to permit claims brought for injuries incurred in the construction of a "Texas Tower," *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958), and on an off-shore oil rig, *Gianfala v. Texas Co.*, 350 U.S. 879 (1955). *See The Showboat*, 47 F.2d 286 (D. Mass 1930) (schooner tied to wharf and used as a restaurant while still equipped for sailing); *The Ark*, 17 F.2d 446 (D. Fla. 1926) (houseboat lacking motive power, but not permanently attached to the shore). *See* cases cited in 2 M. Norris, *supra*, §669 at 303-05. On the facts before it, the distrct court erred in concluding as a matter of law, that the barge upon which Griffith was injured was not a "vessel in navigation." Were this the sole ground upon which to determine seaman status we would be required to reverse on the basis of the evidence adduced below. However, as stated earlier, we agree with the district court that Griffith's argument for his status as a seaman fails for proof of his permanent connection with the vessel or that he was aboard primarily to aid in its navigation.

There must be a more or less permanent connection or attachment between the vessel and the worker as opposed to a temporary relationship. *Senko v. La Crosse Dredging Corp.*, 352 U.S. 370, 372 (1957); *Norton v. Warner Co.*, 321

U.S. 565, 573 (1944); *Bullis v. Twentieth Century-Fox Film Corp.*, 747 F.2d 392, 394 (9th Cir. 1973). A worker whose duties require him to load barges on an irregular or temporary basis is not a seaman. *Thibodeaux v. J. Ray McDermott Co.*, 276 F.2d 42 (5th Cir. 1960). Here, the record evidence indicated that Griffith was assigned on a temporary daily basis to work with the regular river landing crews, and that his contact with the barges had been infrequent, amounting to only 3¾ days of the 74 days he had been employed by Wheeling. This temporary relationship, cannot as a matter of law, give rise to seaman status.

The evidence also indicates that Griffith was not aboard the barge primarily to aid in its navigation. The sole reference to such a function in the record is that Griffith assisted in the throwing of lines from one barge to the other when the barges were being "rounded" between loading operations. At all other times, Griffith was involved in the loading of cargo. A worker upon a barge whose primary duties involve the handling of cargo rather than the carrying out of required navigational responsibilities is a longshoreman rather than a seaman. *South Chicago Coal & Dock Co. v. Basset*, 390 U.S. 251 (1940). Griffith contends that this circuit's decision in *Mack v. Pennsylvania R.R. Co.*, 317 F.2d 761 (3d Cir. 1963), supports his status as a seaman. However the bargeman in *Mack* was *permanently* assigned to work at the river landing where he performed a *substantial* amount of his worktime on the barges, which duties involved *significant* navigational functions, and who was injured while *moving* a loaded barge, 317 F.2d at 762-63. Griffith was not permanently assigned to the river crew, performed insignificant navigational functions, and was not injured while performing such a function. The facts in *Mack* are therefore inapposite to Griffith's situation, and its holding is supportive of the finding below. The district court properly concluded that Griffith was not, as a matter of law,

a "seaman" for Jones Act purposes. Therefore, we next consider Griffith's claims brought as a longshoreman.

IV. The 1972 Amendments.

When Congress, in 1927, enacted the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, ch. 509, §1, 44 Stat. 1424, it provided that an employer's liability for compensation was to be "exclusive and in place of all other liability" to an injured longshoreman.[2] 33 U.S.C. §905. Following the model of typical provisions in state workmen's compensation laws,[3] it also provided that if some person other than the employer or a person in his employ was liable in damages for the longshoremen's injury, he could recover against "such third person." 33 U.S.C. §933(a). There was as well the typical compensation lien on the third party recovery. 33 U.S.C. §933(b). In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Supreme Court held that a longshoreman could recover from a shipowner, not his employer, in a third party action, under the refurbished

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2. Section 5, 33 U.S.C. §905 provided:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

Pursuant to the 1972 amendments, this section was designated as subsection (a), remaining otherwise unchanged. 33 U.S.C. §905, *as amended*, 33 U.S.C. §905(a).

3. 3 Larson Workmen's Compensation §89.10 (1952).

doctrine of unseaworthiness.[4] In *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the Court held that the shipowner could recover full indemnity for any amount paid on the *Sieracki* claim because of an implied warranty of workmanlike service running from the stevedore employer to the shipowner. This was so, some courts held, even when the breach of warranty was the result of the injured longshoreman's own carelessness.[5]

The practical effect of the *Sieracki-Ryan* circle was to eliminate from §5 of the 1927 Act, 33 U.S.C. §905, the "exclusive and in place of all other liabilities" provision, and to make employers of longshoremen liable not only for compensation but also for the open-ended and faultless liability for unseaworthiness. And, by an interpretation of the Extension of Admiralty Act of 1948, 46 U.S.C. §740, in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1962), the Court managed to extend *Sieracki-Ryan* liability shoreward to the pier, at least when the ship's tackle or equipment in some way contributed to the unsafe condition on the pier.[6]

The insurance carriers for the stevedoring companies, disturbed by the Court's dismantling of §5, appealed to Congress. After some hard lobbying by competing interests, Congress, in enacting the 1972 Amendments, substantially raised the workmen's compensation benefits payable under

4. Although the Supreme Court had as far back as 1903, recognized a right to recover damages for injuries caused by unseaworthiness of the ship in *The Osceola*, 189 U.S. 158 (1903), the remedy had, until the mid-1940's remained obscure and relatively little used. See G. Gilmore & C. Black, The Law of Admiralty §6-38, at 383 (2d ed. 1975). Thereafter, the remedy experienced a rapid judicial development into a doctrine recognizing an absolute duty to provide a safe place to work. In addition to *Sieracki*, *supra*, *see* Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

5. McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334 (2d Cir.), *cert. denied*, 395 U.S. 946 (1969).

6. Victory Carriers, Inc. v. Law, 404 U.S 202 (1971), which distinguished *Gutierrez*, but did not overrule it, established the outside limit of the extension of *Sieracki-Ryan* liability shoreward.

the Act to an injured longshoreman, and as a trade-off to the stevedoring employers, overruled the *Sieracki-Ryan* liability. The provisions of the 1972 Amendments relevant to the case *sub judice* which we first consider are those contained in §§2(a), 2(b) & 18(b), 33 U.S.C. §902(3), (4) & (21), which set forth the definitions respectively of the terms "employee," "employer," and "vessel."

An "employee" is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . but . . . not . . . a master or member of a crew of any vessel. . . ." §2(a), 33 U.S.C. §902(3).[7]

An "employer" is one "whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including an adjoining . . . area customarily used . . . in loading . . . a vessel). . . ." §2(b), 33 U.S.C. §902(4).[8] Thus if Griffith was not a member of a crew of a vessel,[9] he was an "employee" and Wheeling was an "employer" within the meaning of the Act.

A "vessel" means "any vessel upon which or in connection with which" a covered employee "suffers injury

7. §2(a), 33 U.S.C. §902(3) provides in full:

"The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

8. §2(b), 33 U.S.C. §902(4) provides in full:

"The term 'employer' means any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."

9. See section III, *supra*, for a discussion of the "crew" contention.

or death . . . and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer or crew member." §18(b), 33 U.S.C. §902(21).[10] For present purposes the key words are "vessel owner" and "owner pro hac vice." American concedes that it is a "vessel owner." Wheeling concedes that it might be found to be an "owner pro hac vice" as that term has been applied in this circuit.[11]

The other 1972 amendment to which we direct our attention, §18(a), 33 U.S.C. §905(a), repeats the exclusive remedy provision of §5 of the 1927 Act, 33 U.S.C. §905. The amendment then adds a new subsection "(b)" which is intended to have the effect of overruling *Sieracki-Ryan* liability:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any such agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter." Section 18(a), 33 U.S.C. §905(b).

10. Section 10(b), 33 U.S.C. §902(21) provides in full:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer or crew member."

11. *See, e.g.*, Blair v. United States Steel Corp., 444 F.2d 1390 (3d Cir. 1971) (per curiam), *cert. denied*, 404 U.S. 1018 (1972); Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 609-10 (3d Cir. 1948). *See generally* G. Gilmore & C. Black, The Law of Admiralty §§4-20 to 4-24, at 239-43 (2d ed. 1975).

The effect of the second clause of the first sentence of §905(b) is to eliminate the vessel's *Ryan* action over against the stevedore. The effect of the next from last sentence is to eliminate the longshoreman's *Sieracki* third party action for unseaworthiness against the vessel. The effect of the first clause of §905(b) is to create in their place, a new negligence third party cause of action against the vessel,[12] and the effect of the last sentence is to make that cause of action the exclusive remedy of a longshoreman against a vessel. The second sentence relieves the vessel from liability or negligence caused by persons engaged in providing stevedoring services, thus preventing the imposition of liability on the vessel on some respondeat [sic] superior or absolute duty of care basis.

One would like to assume that the ghost of *Sieracki-Ryan* has been exorcised completely by the addition of §905(b), and that the exclusive remedy provision of §905(a) has been restored to the pristine vigor intended by Congress in 1927. But what of the situation where someone is both an "employer" and a "vessel"? The reference to "vessel" in

12. Although §905(b) created a new negligence remedy, Congress' failure to expressly define the standard of care to be applied under it has led some commentators to conclude that it should be treated as if it were a Jones Act action. 46 U.S.C. §688. See section VIII, *infra*. The district court below attempted to equate the standard of care under these two statutory remedies. See section V, *infra*. However, because Congress appears to have directed the application to a uniform, national, *land-based* standard under §905(b), see notes 21 & 22, *infra*, reference to the Jones Act practice is unconvincing. In view of the posture in which this case came before us, we do not today decide what that standard ought to be except to suggest the need for careful analysis in light of what Congress has proposed. See note 24, *infra*, and accompanying text.

§905(b) is to "vessel" as defined in the 1972 amendment quoted earlier; that is, not only the vessel itself, but also its "owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." §18(b), 33 U.S.C. §902(21). If any of these *also* employ longshoremen, may they be liable both for compensation benefits and for negligence? We can set to one side crew members engaged in loading or unloading since by definition they are not "employees," and thus are not covered by the Act. §2(a), 33 U.S.C. §902(3). But what of the owner who employs longshoremen who are not crew members?

V. The District Court's Analysis.

The district court correctly recognized, and American does not contest on appeal, that Griffith has a third party negligence action against it as owner of barge No. 2730. The court also properly held that because Wheeling had exclusive control and possession of the barge at the time of the injury it was under our cases a vessel owner *pro hac vice*. But it refused to draw the conclusion that because a *pro hac vice* owner was by definition a "vessel," Wheeling was a "vessel" within the meaning of §905(b) for purposes of negligence liability. Instead the court concluded:

> "The fact that such previously permissible actions against a party such as Wheeling-Pittsburgh are no longer permissible, can be taken to mean that Congress did not intend to permit a cause of action against an owner *pro hac vice* after the effective date of the 1972 amendments to the LSHWCA."[13]

This reasoning disregards the plain language of the statute. Congress clearly did contemplate actions against owners *pro hac vice*. The definition of "vessel" in the amended codification, §18(b), 33 U.S.C. §902(21), appears immediately following §18(a) which sets forth the new

13. 384 F. Supp. at 237.

negligence remedy in 33 U.S.C. §905(b).[14] The "vessel" made liable for negligence in §18(a) is the "vessel" as defined in §18(b). No construction can be placed on the statute which would differentiate an owner *pro hac vice* from an owner, a charterer, an agent, or a master.

A second reason relied on by the district court for rejecting the negligence claim against Wheeling was that to do so would in effect "allow him to pursue the Jones Act negligence remedy which is clearly unavailable to him since he has been found not to be a 'seaman'."[15] This reason will not stand scrutiny either, since there is no indication that Congress sought to equate the standard of care due a seaman under the Jones Act with that due a longshoreman under §905(b). In fact, as will be discussed in Section VIII of this opinion, *infra*, it appears that it was Congress' intent to have the courts apply a uniform, national, land-based standard rather than the more burdensome standard under the Jones Act which permits "even the slightest" negligence to sustain a recovery. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). To attempt to equate these two very different statutory remedies as a basis for denying Wheeling's potential liability is unconvincing.

Thus we cannot affirm the summary judgment for Wheeling against Griffith on any of the grounds relied on by the district court.

VI. Alternative Constructions.

One clause of §905(b) which might potentially insulate Wheeling from liability is the language "no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." The members of the barge crew who fastened the cables to the hatch covers, and the crane operator who

14. 1 U.S Code Cong. & Admin. News 1467-68 (1972).

15. 384 F. Supp. at 237 (footnote omitted). See Section III, *supra*, for discussion of Griffith's "seaman" status.

applied tension to the cable which opened the hatch through which Griffith fell, clearly were providing such stevedoring services, and none of their negligence can be the basis for imposing liability on an owner *pro hac vice*. But on the present record, there is evidence that Joseph Allfree, Wheeling's crew foreman, observed the defective condition of the hatch covers and departed, apparently without giving any warning of a potentially hazardous condition. There is no conclusive evidence that he made these observations in the capacity of stevedore or as agent of Wheeling as owner *pro hac vice*. At a trial, testimony might so conclusively establish Allfree's stevedore status that Griffith could not get to the jury, or instead might establish that his conduct was not negligent. But on the present record we could not, especially at the appellate level, grant summary judgment for Wheeling on either ground.

The final, and most compelling construction which would insulate Wheeling from liability for negligence, is to concentrate not on §905(b), but on §905(a), the exclusive remedy provision, which has been a part of the statute since 1927. The language in §905(a) could hardly be plainer:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of *all other* liability of such employer to the employee. . . ." (emphasis supplied).

There is no exception in §905(a) for §905(b) liability of an "employer" who is also a "vessel."[16] If the claimant is an "employee" as defined in §2(a)(3), that is, if he is a person engaged in maritime employment who is not "a master or member of a crew of any vessel," 33 U.S.C. §902(3), then he has no remedy against his employer even when the employer also is the "vessel." If Griffith was not a member of the crew of barge No. 2730 he was an employee, and the exclusive

16. The only exception in §905(a) is the liability of an employer who fails to secure payment of compensation as required by the Act.

remedy provision bars any remedy other than workmen's compensation.[17]

This construction would leave longshoremen covered by the Act with third party actions against anyone who may be liable, under federal or state law, except an "employer" who is liable only for compensation. Such a construction would be consistent with the language of 33 U.S.C. §933(a), the "third party" section, which provides in part:

> "If . . . the person entitled to such compensation determines that some person *other than the employer* . . . is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person." (emphasis supplied).

It would place longshoremen in the same position with respect to seaward third parties as to shoreside third parties. If a truck owned and operated by an outside contractor should injure the longshoreman on the pier he would have a third party action, while if the truck was owned and operated by his employer, he would not. The heart of all workmen's compensation systems is the trade-off between the certainty of benefits and the limitation of employer liability. There is no argument in logic and reason why an employer who owns barges should be treated less favorable than an employer who owns trucks.

But while logic and common sense suggest the literal application of §905(a), the ghost of *Sieracki-Ryan* stands in the way. The Supreme Court has already construed the exclusive remedy provision as permitting a suit against a *pro hac vice* owner who was also an employer. In *Reed v. The Yaka*, 373 U.S. 410 (1963), a longshoreman was injured as a result of an unseaworthy condition on board the vessel The Yaka, which was under bareboat charter to Pan-Atlantic

17. This view has the support of at least some of the treatise writers. *See, e.g.*, G. Gilmore & C. Black, The Law of Admiralty §6-57, at 450 (2d ed. 1975).

Steamship Corporation, his employer. Reed brought an in rem action against the vessel. He was not a member of the crew, and thus was covered under LHWCA. Reviewing the way in which *Sieracki* and *Ryan* had already made an end-run around the exclusive remedy provision in §905(a) (then §905), Justice Black, writing for the Court, concluded:

> "In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. . . ." 373 U.S. at 415.

Thus §905, now §905(a), was held to be no bar to a suit against a vessel chartered to a *pro hac vice* owner which was also an employer liable for compensation payments. As the treatise writers have observed:

> "After Reed v. The Yaka the longshoreman's action might just as well have been brought directly against his employer—which would have simplified the situation procedurally. However, in the customary employment situation, the parties, out of politeness or inertia, continued to observe the elaborate formalities of the Sieracki-Ryan ritual: longshoreman sued ship or shipowner, who impleaded employer in his third party indemnity action. . . ."
>
> G. Gilmore & C. Black The Law of Admiralty §6-55, at 445 (2d ed. 1975) (footnote omitted).

Since Congress made no change in the operative language of the exclusive remedy provision, we would appear to be bound by the eviscerating construction of *Reed v. The Yaka*, *supra*. Congress was aware of that construction, and

deliberately chose to deal with it only to the limited extent of the second sentence in §905(b)[18] The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence of persons engaged in providing stevedoring services, but is not relieved of liability for its own "owner" occasioned negligence.[19] See 1A Benedict on Admiralty §27, at 2-24; §115, at 6-16 (7th ed. 1973).

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18. The House Report states:

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons." 3 U.S. Code Cong. & Admin. News 4705 (1972) (footnotes omitted).

19. The House Report states:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the *vessel* put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and

(continued)

Thus, no construction appears open which would shield Wheeling from liability as a *pro hac vice* owner for negligence of employees engaged in services in connection with the barge other than stevedoring. Since on this record, as we indicated earlier, questions of material fact exist concerning the status of employees who observed the condition of the hatch covers, or exist as to their own negligence as barge crewmen, rendering services other than stevedoring services, the district court's granting of summary judgment in Wheeling's favor against Griffith must be reversed.

VII. American's Cross-Claim.

The district court correctly held that American had no right of indemnification, express or implied, against Wheeling as a stevedore employer, because, as we pointed out above, the second clause of the first sentence in §905(b) eliminated the *Ryan* remedy. But American also asserts a claim for contribution.

If it should be determined that Wheeling's only negligence is that of employees performing stevedoring duties, there will be no joint tortfeasor liability. *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952); *Atlantic Coast Lines R. Co. v. Erie Lackawanna R. Co.*, 406 U.S. 340 (1972).[20] We have held, however, that Wheeling may be held liable for negligence as a *pro hac vice* owner for non-stevedoring, "owner" negligence. If both Wheeling, as *pro hac vice* owner, and American, as vessel owner, are found to be negligent, joint tortfeasor contribution between them in this noncollision maritime case is available. *Cooper*

removed by the *vessel* in the exercise of reasonable care by the *vessel* under the circumstances. *The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.*"

3 U.S. Code Cong. & Admin. News 4704 (1972) (emphasis supplied).

20. *See generally* Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Cal. L. Rev. 304 (1957).

Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 113 (1974). In *Cooper Stevedoring*, the Court did not determine whether contribution should be determined in accordance with the comparative degree of fault of the parties. 417 U.S. at 108 n.3. However, more recently, the Court in a maritime collision case, reversed the long line of authorities providing for equal contribution in favor of a comparative negligence rule of contribution. *United States v. Reliable Transfer Co.*, 43 U.S.L.W. 4610, 4615 (U.S., May 19, 1975). *We see no reason why the Reliable Transfer* rule should not apply in noncollision, as well as in collision maritime cases.

Since Wheeling's potential liability as a *pro hac vice* owner raises the possibility of a claim by American for contribution under *Cooper Stevedoring* and *Reliable Transfer*, the order granting summary judgment in Wheeling's favor against American must also be reversed.

VIII. The Standard of Care.

American would have us suggest to the district court the appropriate standard of care a vessel owes a longshoreman under the negligence remedy created by §905(b). While neither that provision, nor the balance of the 1972 amendments address the issue, the House Report suggests the intention to apply land-based common law negligence principles on a uniform national basis.[21]

21. The House Report states:

"Under this standard, as adopted by the Committee, there will, of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

(continued)

American suggests that the court should look to the landowner liability as defined in the *Restatement (Second) of Torts* §343A (1965) for an appropriate analogue. Some district courts have already adopted such a standard.[22] That approach would foreclose use of the higher standard of care developed under the Jones Act,[23] which permits recovery for "even the slightest" negligence. *E.g., Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957). A leading treatise, on the other hand, urges:

> "If the courts fashion the §905(b) action in the image of the Jones Act action, they will find helpful precedents for most of the problems that will arise in litigation. If they do so, the LHCA harbor workers will be substantially in the position of the Jones Act seaman (with compensation benefits substituted for maintenance and cure) except that the harbor workers will not be entitled to recover under the no fault fringes of the unseaworthiness doctrine. If the courts do not do that, the §905(b) U.S.C.A. annotations will in time rival the Jones Act annotations." G. Gilmore & C. Black, The Law of Admiralty §6-57, at 455 (2d ed. 1975).

We cannot in this case do more than suggest that there is a problem.[24] The district court did not decide any standard of care issue, and none is before us in a context sufficiently concrete and adversary for our decision at this time.

IX. Conclusion.

The summary judgment in favor of Wheeling and against Griffith and American will be reversed and the cause remanded for further proceedings consistent with this opinion.

. . . .

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable."

3 U.S. Code Cong. & Admin. News 4704, 4705 (1972).

22. *See* Ramirez v. Toko Kaiun K.K., 385 F. Supp. 644 (N.D. Cal. 1974); Birrer v. Flota Mercante Grancolombiana, 386 F. Supp 1105 (D. Ore. 1974); Citizen v. M/V Triton, 384, F. Supp. 198 (E.D. Tex. 1974); Fedison v. The Vessel Wislica, 382 F. Supp. 4 (E.D. La. 1974); *cf.* Streatch v. Associated Container Transp., Ltd., 388 F. Supp. 935 (C.D. Cal. 1975).

23. 46 U.S.C. §688.

24. The other leading treatise comes to the opposite conclusion. "It is evident that Congress has not adopted the standard of the shipowner's liability under the Jones Act . . . ." 1A Benedict on Admiralty §112, at 6-10 (7th ed. 1973). See the discussion in Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759, 767-68 (E.D. Pa. 1974) ***appeal dismissed***, No. 75-1223 (3d. Cir., April 30, 1975), *pet. for cert. filed*, 44 U.S.L.W. 3054 (U.S., July 14, 1975). See note 12, *supra*.

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THOMAS W. GRIFFITH,
Libellant,

v.

WHEELING PITTSBURGH STEEL CORPORATION and AMERICAN COMMERCIAL LINES, INC.,
Respondents.

CIVIL ACTION
NO. 73-0706

OPINION

This case involves an action for damages brought by plaintiff, Thomas W. Griffith, against his employer, Wheeling-Pittsburgh Steel Corporation, and against American Commercial Lines, Inc. Plaintiff was injured on May 26, 1973, while working on American's coal barge no. 2730 which, according to Wheeling-Pittsburgh's earlier request, was in the possession and use of Wheeling-Pittsburgh Steel at the time. Plaintiff's complaint alleges that his injury was caused by the negligence of both defendants as well as by the unseaworthy condition of American's barge. Both defendants have filed cross-claims for indemnity. Presently before the Court are 1.) Wheeling-Pittsburgh's motion for summary judgment in its favor as to plaintiff's claims against it and American's claim for indemnity, and 2.) American's motion for summary judgment in its favor as to plaintiff's claims against it and its own claim for indemnity from Wheeling-Pittsburgh.

On February 11, 1973, Griffith began his employment with the Wheeling-Pittsburgh company at its Allenport, Pennsylvania plant. Griffith began work in the common

labor pool of the construction department. The nature of his work was such that he would report to the pool each morning and thereafter report to whatever assignment was available that day. During this period, all of Griffith's duties were performed on land. On April 1, 1973, Griffith bid into the hot mill labor pool. As was the case with his work previously, while a member of the hot mill labor pool, Griffith had no permanent duties, but rather was assigned to various jobs on a daily basis.

Including the date of the accident as a full day of work, Griffith worked 74 days for Wheeling-Pittsburgh. Of this time, he was temporarily assigned to work at the company's barge landing with longshoreman-type duties for 3¾ days, specifically, April 23rd for less than a full day, April 27th, April 28th and May 26th, 1973. Thus, of Griffith's work while he was employed by Wheeling-Pittsburgh, 94.6% was exclusively upon the land and only 5.4% of the time that he was employed by the company was spent in and about the barge landing at the Allenport plant. Of that 5.4% only about one-half of that time was actually spent working on a barge while it was in the water. The rest of the time that he was assigned to the barge landing, Griffith spent working on the railroad cars in the billet yard.

On the day of the accident, Griffith was assigned to work with the barge crew at the landing. Initially, the group with which he was working loaded an open hopper barge with pipe and tubing. Griffith worked inside the hopper of this barge loading this cargo. Then, the first barge was moved and American's barge no. 2730 was placed into loading position. Neither the pipe barge nor American's barge no. 2730 were "navigated" as that term is used in a Jones Act context. After the pipe barge was loaded, the two barges were simply "rounded," or turned around in the water so that the outside barge (no. 2730) was then in the

loading position. During the time that the barges were moving, Griffith's sole assistance in the task involved merely throwing ropes from one barge to another.

The accident which is the focus of this case occurred around 2:30 P.M. on May 26, 1973 as the group with which Griffith was working was attempting to pull one of the barge's covers shut. The covers would not move properly and thus a crane was being used to attempt to pull them shut with a cable. Griffith and another man were injured when the cable hook attached to the cover came loose and Griffith and the other man were thrown by its impact into the hold of the barge.

Legal Issues Involved

The issues in this case require explanation of the interrelationship of the Jones Act, the Longshoreman and Harbor Worker's Compensation Act, and the unseaworthiness remedy. The Jones Act, 46 U.S.C. §688, enacted in 1915, gives "any seaman" the right to "maintain an action for damages at law" against his employer for personal injuries suffered in the course of his employment. In 1927 Congress enacted the Longshoreman's and Harbor Worker's Compensation Act, (LSHWCA) 33 U.S.C. §901-950. The Longshoreman's Act covers all persons "employed in maritime employment . . . upon navigable waters," and establishes such persons' exclusive rights against their employers. 33 U.S.C. §995. The Longshoreman's Act excepts from its provisions only "a master or member of a crew of any vessel." 33 U.S.C. §903(a); §902(3).

Since the Jones Act does not define the word "seaman," the interpretation of what persons fall within the Act's coverage has been left to the courts. The decision of the Supreme Court in *International Stevedoring Company v. Haverty*, 272 U.S. 50 (1926), expanded the strict construction of the word "seaman" to include shoreside workers and

those involved in loading or unloading barges. Since the enactment of the LSHWCA in 1927, however, the courts have consistently held that the benefits of the Jones Act are available only to a member of a crew or vessel, *e.g.*, *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1 (1946), since a member of a crew or vessel is excluded from the otherwise broad coverage of the Longshoreman's Act.

It is said in the *Swanson* case, "We must take it that the effect of these provisions of the Longshoreman's Act is to confine the benefits of the Jones Act to members of the crew of a vessel plying in navigable waters." *Id.* at 7. Thus, for Griffith to have any rights under the Jones Act, he must be able to prove that he was a seaman, that is, a member of a crew of a vessel when he was injured.

On the other hand, it is clear that Griffith is a worker covered by the Longshoreman's Act. The amended act contains the following definition of an employee at 33 U.S.C. §902(3):

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder, and ship breaker, ***but such term does not include a master or member of a crew of any vessel . . .***" (emphasis added)

It is also clear that Wheeling-Pittsburgh is an employer under the terms of the Longshoreman's Act. The amended act contains the following definition at 33 U.S.C. §902(4):

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States including any adjoining pier, wharf, . . . or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."

As the employee of a LSHWCA employer, Griffith has been receiving LSHWCA benefits since the date of his injury.

Under the previous state of the law as exemplified by *Seas Shipping Company, Inc. v. Sieracki*, 328 U.S. 85 (1946) and *Blair v. United States Steel Corporation*, 444 F.2d 1390 (3rd Cir. 1970) *cert. denied* 404 U.S. 1018, plaintiff Griffith could have pursued an unseaworthiness cause of action against the vessel owner (American) and the owner *pro hac vice* of the vessel (Wheeling-Pittsburgh) if he were able to show that he was doing work traditionally done by a seaman at the time of his injury. But, as of this date, the unseaworthiness remedy for longshoremen (those covered by the LSHWCA) has been eliminated by the 1972 amendments to the LSHWCA. The 1972 amendments became effective on November 27, 1972, well before plaintiff Griffith's accident. The Longshoreman's Act now provides, at 33 U.S.C. §905(b):

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of §933 of this title and *the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . the liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness* or a breach thereof at the time the injury occurred." (emphasis added).[1]

1. As stated in *Garcia v. Queen Ltd.*, 487 F.2d 625 (5th Cir. 1973): "Recent amendments to the [Longshoreman's Act] have foreclosed suits by harborworkers against ship owners based on the theory of unseaworthiness . . . .Under the amendments harborworkers are now allowed to sue for damages from ship owners only on the grounds of negligence." *Id.* at 628, n.6. And, as is stated in *Addison v. Bull Food Carriers*, 489 F.2d 1041 (1st Cir. 1974): "The amendments further provided for increases in workman's compensation benefits payable to the injured longshoreman by his employer and for abolition of the longshoreman's right to seek recovery against the shipowner for unseaworthiness . . . .Thus, the injured longshoreman lost the theory of recovery against the shipowner previously established in *Seas Shipping v. Sieracki* . . . but gained increased benefits from the stevedore." *Id.* at 1042.

The first problem then which faces the Court is the question of whether or not Griffith is a "seaman," as that term is used in a Jones Act context. Plaintiff contends that the determination of an individual's Jones Act seaman status is invariably a question for the jury; one which may not be determined by the Court on summary judgment. He bases his contention upon the holdings of the courts in the following cases: *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370 (1957); *Butler v. Whiteman*, 356 U.S. 271 (1958); and *Mach v. Pennsylvania Railroad Co.*, 317 F.2d 761 (3rd Cir. 1963). But, in accordance with the opinion of Judge Weis of this Court (now of the Third Circuit Court of Appeals) in *Classic v. United States Steel Corporation*, C.A. No. 72-277 (W.D. Pa., Dec. 22, 1972) (unpublished opinion),[2] I will hold to the contrary.

The distinction upon which I base my decision was clearly set out by the Supreme Court of the United States in their decision in *Senkov LaCrosse Dredging Co., Supra.* when they said:

> "In *South Chicago Co. v. Bassett*, 309 U.S. 251, we said that whether or not an employee is a 'member of a crew' turns on questions of fact and that, if a finding on this question has evidence to support it, the finding is conclusive.... We believe, however, that our decision in *South Chicago v. Bassett, supra.*, has not been fully understood. Our holding there that the determination of whether an injured person was a member of a crew is to be left to the finder of fact, meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

2. As Judge Weis stated in *Classic, supra.*: "While recognizing that the use of summary judgment is seldom appropriate to determine whether a person is a seaman within the purview of the Jones Act, nevertheless, the uncontroverted facts presented by this case require the procedure to be invoked."

In other words, as is pointed out in 2 Norris, *Law of Seamen*, 3rd Ed., 1970 at p. 297:

> "The determination of whether the plaintiff is a seaman under the Jones Act should not be taken from the jury by the trial judge if there is an evidentiary basis for making a finding. When conflicting inferences may be drawn from undisputed underlying facts the determination of whether an individual is a seaman must be made by the fact finder. Only when there is no evidentiary basis to support a jury finding that the plaintiff was a seaman when injured can the court's decision of summary judgment for the defendant be sustained as a matter of law."

The distinction then, which plaintiff has failed to apprehend here, is between those situations in which it is appropriate to leave the "seaman" determination to the court rather than to the jury and those situations in which the determination has been left to the jury and will be left undisturbed. The latter situation, of course, embodies the application of a fundamental principle of appellate review to Federal maritime jurisdiction, no more or less. The former situation, by way of contrast, merely sets up a standard to enable the court to determine whether or not to leave a Federal maritime question to the jury. It does not amount to an absolute stricture that the determination of whether or not an injured worker is a Jones Act seaman must *always* be left to the jury. Only when conflicting inferences may be drawn from the underlying facts must the determination of whether an individual is a seaman be left to the jury. When there is no evidentiary evidence whatsoever, as in this case, to support a finding that the plaintiff was a seaman when injured, the court may permissibly rule as a matter of law that the injured party was not a seaman.[3]

3. Plaintiff consistently refers to the Jones Act as a humanitarian statute meant to be liberally construed. He cites such cases as *Mach* v. *(continued)*

The three primary requirements which must be met in order to establish that a person is a member of a crew as that term is used in the Jones Act are: 1.) that the vessel be in navigation upon navigable waters; 2.) that there be a more or less permanent connection with the vessel by the injured party; and 3.) that the worker be aboard primarily to aid in navigation. 2 Norris, *Law of Seamen*, 3d Ed. 1970, §659. Here, the vessel upon which Griffith was injured was not in navigation, Griffith had no permanent connection whatsoever with the vessel, and Griffith was not aboard primarily to aid in navigation. Thus, I hold, under the facts of this case, that a worker who is permanently assigned to land-based duties as a member of a steel company labor gang, who is injured on a barge while temporarily working at a river landing, over 95% of whose work activities were upon land, whose contact with barges was infrequent and irregular and who, at the time of his injuries, was not navigating or assisting in navigating the barge, is not a seaman within the meaning of the Jones Act.

Rights of the Parties

In summary then, these are the salient features of the parties' legal rights: 1.) Plaintiff Griffith's obvious remedy as to defendant Wheeling-Pittsburgh is the payment of benefits under the LSHWCA. This Court takes notice of the fact that since the date of the accident, plaintiff Griffith has received from Wheeling-Pittsburgh payments under the Act amounting to approximately $120.00 per week; 2.) Because it is

Pennsylvania Railroad, *supra*, as examples of this supposedly required liberality of construction. The liberality of construction to which this and other Federal maritime questions were subjected was clearly a reaction to the law as it stood before October of 1972 and thus plaintiff's citations were inapposite. The 1972 Amendments to the LSHWCA, wherein, in return for increased compensation, injured maritime workers' legal remedies were drastically limited, have clearly altered that pre-existing state of affairs. To hold under these circumstances that the question of whether an injured person was a "seaman" is invariably for the jury would be to emasculate the 1972 Amendments to the LSHWCA.

found that plaintiff was not a "seaman" within the meaning of that term as used in the Jones Act at the time of the accident, plaintiff has no Jones Act remedy against Wheeling-Pittsburgh Steel Company; 3.) Under the express terms of the 1972 amendments to the LSHWCA, as quoted above, plaintiff has no remedy against anyone under the doctrine of unseaworthiness; 4.) Under the express terms of the 1974 amendments to the LSHWCA, as quoted above, American Commercial Lines has no rights of indemnity versus Wheeling-Pittsburgh. By the same token, of course, Wheeling-Pittsburgh has no right to indemnity against any party to this action, though the point is academic in this context.

The sole question then which remains before the Court is whether or not plaintiff Griffith retains a cause of action for negligence against either American Commercial Lines or Wheeling-Pittsburgh. The most useful material available for providing an insight to this question is the House Report of the Legislative History of the LSHWCA Amendments of 1972 (P.L. 92-576). The House Report from which I quote and the Senate Report, on behalf of the Committee on Labor and Public Welfare, are identical in all important respects. The House Report under the heading ELIMINATION OF UNSEAWORTHINESS REMEDY contains the following analysis of the purpose and impact of the Longshoreman Act Amendments:

> "Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fair to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in

the same position, insofar as third-party liability is concerned, as land-based third parties in non-maritime pursuits.

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like.
>
> "Persons to whom compensation is payable under the act retained the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus, a vessel shall not be liable when damages for acts or omissions of stevedores or employees of stevedores subject to this act, [citations omitted] [or] for the manner or method in which stevedores or employees of stevedores subject to this act perform their work...".

After further discussion the House Report goes on to say:

> "[T]he Committee intends that the admiralty concept of comparative negligence, rather than the common law fule [sic] as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of 'assumption of risk' in an action by an injured employee shall also be applicable."

Because the Act itself and the Congressional Reports which set out the Act's purpose and background envision the primary situation to which the Act pertains as being one in which an employee of a stevedoring company is injured on a

vessel, there is little to be found in either the Act or the legislative history pertaining directly to the precise question here at hand. Clearly though, an employee of a stevedoring company, a longshoreman in the classic sense, or a workman in the situation in which plaintiff Griffith found himself, who is not a "seaman" within the meaning of the Jones Act, has a cause of action in negligence against the vessel under the 1972 Amendments to the LSHWCA. The vessel in this case is no. 2730, owned by defendant American Commercial Lines, Inc. and plaintiff has a cause of action in negligence against that defendant. 33 U.S.C. §905(b), as amended. But, it is less clear on the surface whether or not plaintiff has a cause of action against Wheeling-Pittsburgh Steel itself for negligence.

Because Wheeling-Pittsburgh Steel held exclusive control and possession of barge No. 2730 on the date of plaintiff's injury, it's legal status is as owner *pro hac vice* of the vessel. *Blair v. United States Steel Corp., supra.* Plaintiff argues that the owner *pro hac vice,* Wheeling-Pittsburgh, is liable in negligence under the 1972 Amendments to the Act using the following logic: It is clear that persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, "vessel" being the word used throughout the Act and the legislative history to denote that party against whom a negligence action may be maintained. Plaintiff then quotes from 33 U.S.C. §902(21), the amended LSHWCA:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefit under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, *owner pro hac vice*, agent, operator, charter or bare boat charterer, master, officer, or crew member." [emphasis added]

Plaintiff's argument in sum is that a "vessel" is liable in negligence under the amended LSHWCA, an *owner pro hac vice* is a vessel, Wheeling-Pittsburgh was *owner pro hac vice* of barge no. 2730, therefore, defendant Wheeling-Pittsburgh is liable in negligence to plaintiff Griffith.

However, in attempting to construe a Congressional Act which does not deal in express terms with the inland waterway situation with which this Court is faced, there are contrary implications of even greater force to be drawn. First, it must be noted that the 1972 amendments to the Act unequivocally outlaw actions for negligence against or through stevedores and outlaw indemnification. Here, defendant Wheeling-Pittsburgh was the party providing stevedoring services at the time of the injury to plaintiff. Under the previous state of the law, an action based upon the theory of indemnity and/or an action seeking to hold a party liable for the actions of stevedores would have been the proper means to maintain an action against a party situated as Wheeling-Pittsburgh is here situated. The fact that such previously permissible actions against a party such as Wheeling-Pittsburgh are no longer permissible, can be taken to mean that Congress did not intend to permit a cause of action against an owner *pro hac vice* after the effective date of the 1972 amendments to the LSHWCA.

Second, to hold that plaintiff Griffith has a cause of action against Wheeling-Pittsburgh Steel under these circumstances, would be to allow him to pursue the Jones Act negligence remedy which is clearly unavailable to him since he has been found not to be a "seaman."[4] It seems

4. If it had been found that plaintiff was a "seaman" at the time of his injury, the restrictions of the LSHWCA would not apply to him and he would have had an action for unseaworthiness, an action for maintenance and cure and an action for negligence under the Jones Act against defendant Wheeling-Pittsburgh. Since he is not a "seaman", he has no action for negligence against his employer.

apparent to me, notwithstanding the material supporting the contrary implication which plaintiff wishes this Court to draw, that the manifest congressional intent behind the 1972 amendments to the LSHWCA was to simplify actions of this sort, and the [sic] free this area of the law from the confusing and complex body of often antiquated legal reasoning which has been built up around it down through the years.

The simple fact is that the LSHWCA is intended to be a Workmen's Compensation Statute for persons engaged in maritime employment and is intended to function as any workmen's compensation statute does — that is, in return for his waiver of the right to sue his employer, the employee becomes beneficiary of a generous, institutionalized system of compensation. Applied to the facts of this case, this means that as to the employer, Wheeling-Pittsburgh, plaintiff has no cause of action for negligence because he is and has been receiving LSHWCA benefits. Even if this were not the unavoidable conclusion before the passage of the 1972 amendments, it must surely be the impartial observers' conclusion afterward.[5] Moreover, the Court takes notice of the fact that since 1928 the LSHWCA has been *the* workmen's compensation statute for the District of Columbia, for non-Federal defense employees and for certain others who fall under no state's workmen's compensation

5. See, *Senate Hearings*, Subcommittee on Labor and Public Welfare, 92nd Cong. 2nd Sess. (1972), especially the testimony of Messrs. Scanlan and Martzel at 258-274 and 591-601, respectively. See also, the Opinion of the Three Judge Court in the Eastern District of Pennsylvania on this same issue in *Lucas* v. *"Brinkney" Schiffahrts Ges.*, 379 F.Supp 759, 769 E.D. Pa. 1974 where it is said: "While leaving to future development the nature of the negligence action against the vessel, we consider it clear that with respect to the stevedore the sole liability was that provided under the Act. Congress sought to eliminate all actions against the stevedore whether for indemnity or contribution, whether based on tort or on contract, and whether for fees and expenses. Allowance of any such actions, even a *pro tanto* recovery to the extent of payments made by the employer under the Act, would create the circuitous type action Congress considered was too costly and disruptive of the compensation scheme to be permitted."

protection. As stated by the Supreme Court in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970),: "[The LSHWCA grants] to longshoremen the right to receive workman's compensation benefits from their employers for accidental injury or death arising out of their employment. These benefits are made *exclusive of any other liability for employers who comply with the Act*. The Act does not, however, affect the longshoreman's remedy against persons other than his employer such as a shipowner..." *Id.* at 394, n. 11 [emphasis added] See also, *Powers v. Bethlehem Steel Corporation*, 477, F.2d 643, 648, n.6 (1st Cir. 1973).

With this clear Congressional intent in mind, I will hold, construing the 1972 amendments to the LSHWCA and the legislative history thereto, that under the facts and circumstances of this case, plaintiff has no cause of action in negligence against defendant, Wheeling-Pittsburgh Steel Company. For the reasons stated above, I will hold that plaintiff Griffith does [sic] have a cause of action in negligence against American Commercial Lines, Inc.

An appropriate order in accordance with this opinion shall be entered.

ORDER

Now, to-wit, this 5th day of November, 1974, in accordance with the foregoing Opinion in the above-captioned case, It Is Ordered, that defendant Wheeling-Pittsburgh Steel Corporation's motion for summary judgment be and the same is hereby granted in all particulars. The action by plaintiff against defendant Wheeling-Pittsburgh and the cross-claim by defendant American Commercial Lines against Wheeling-Pittsburgh be and the same are hereby dismissed. Wheeling-Pittsburgh's cross-claim against American Commercial Lines is hereby dismissed as moot.

It Is Further Ordered that plaintiff and defendant American Commercial Lines will amend their pleadings in the above-captioned case so as to be in conformity with the foregoing opinion.

...../s/ Hubert I. Teitelbaum.....
HUBERT I. TEITELBAUM
United States District Judge

In The
United States District Court
For The Western District of Pennsylvania

THOMAS W. GRIFFITH,
Libellant
v.
WHEELING PITTSBURGH STEEL CORPORATION and AMERICAN COMMERCIAL LINES, INC.,
Respondents.
CIVIL ACTION NO. 73-0706

ORDER

And Now, to-wit, this 21st day of November, 1974, It Is Ordered that the Order in the above-captioned case entered November 5, 1974 be amended to read as follows:

It Is Ordered 1. that defendant Wheeling-Pittsburgh's motion for summary judgment be and the same is hereby granted in all particulars. Since it disposes of all claims against, and all rights and liabilities of defendant Wheeling-Pittsburgh in this litigation, this order constitutes a final judgment as per Rule 54(b) of the Federal Rules of Civil Procedure; 2. The action by plaintiff against defendant Wheeling-Pittsburgh be and the same is hereby dismissed; 3. The cross-claim by defendant American Commercial Lines against defendant Wheeling-Pittsburgh, including the cross-claim for stipulation be and the same are hereby denied and dismissed; 4. Defendant Wheeling-Pittsburgh's cross-claim against American Commercial Lines be and the same is hereby dismissed as moot; 5. Defendant American Commercial Lines' motion for summary judgment against plaintiff be and the same is hereby denied; 6. Plaintiff and defendant American Commercial Lines will amend their pleadings in the above-captioned case so as to be in conformity with the foregoing Order and Opinion.

...../s/ Hubert I. Teitelbaum.....
Hubert I. Teitelbaum
United States District Judge

Appendix E

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 75-1022

THOMAS W. GRIFFITH

vs.

WHEELING PITTSBURGH STEEL CORPORATION
and AMERICAN COMMERCIAL LINES, INC.,

Thomas W. Griffith, libellant above named,
and American Commercial Lines, Inc.,
respondent above named,
Appellants

(D.C. Civil Action No. 73-706)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and
ALDISERT AND GIBBONS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 21, 1974, be, and the same is hereby reversed and remanded for further proceedings consistent with the opinion of this Court. Costs taxed against the appellee.

ATTEST:

...../s/ THOMAS F. QUINN.....
Clerk

August 11, 1975

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SUMMARY OF UNITED STATES FLAG PASSENGER AND CARGO VESSELS OPERATING OR AVAILABLE FOR OPERATION, ON 1, JANUARY, 1975

(Exclusive of Fishing and Excursion Vessels, General Ferries, and Dredges, Derricks, etc., used in Construction Work)

Corps of Engineers, U.S. Army
Lower Mississippi Valley Division
Waterborne Commerce Statistics Center
New Orleans, Louisiana, 70161

Types of vessels	*Total 1974*	*1, January, 1975* — *Total 1975*	*Atlantic, Gulf and Pacific Coasts*	*Mississippi River System and the Gulf Intracoastal Waterway*	*Great Lakes System*
SELF-PROPELLED					
Dry cargo and/or passenger, steam or motor:					
Number of vessels	1,691	1,708	772	616	320
Horsepower	7,720,382	7,635,754	6,277,756	631,023	726,975
Cargo capacity (short tons)	8,031,802	7,936,187	4,921,212	110,850	2,904,116
Number of passengers (cap.)	129,306	131,860	88,777	19,885	23,198
Ferries, railroad car, steam or motor:					
Number of vessels	19	19	10	—	9
Horsepower	60,934	50,234	6,634	—	43,600
Number of railroad cars (cap.)	283	340	109	—	231
Tankers, steam or motor:					
Number of vessels	319	317	305	—	12
Horsepower	2,885,066	2,957,986	2,938,446	—	19,540
Cargo capacity (short tons)	8,534,893	8,825,852	8,775,814	—	50,038
Towboats:					
Number of vessels	4,035	4,100	1,561	2,404	135
Horsepower	4,621,450	5,088,221	1,729,351	3,226,545	132,325
Sailing vessels:					
Number of vessels	10	7	7	—	—
Cargo capacity (short tons)	25	—	—	—	—
Number of passengers (cap.)	205	559	559	—	—
Total, self-propelled:					
Number of vessels	6,074	6,151	2,655	3,020	476
Horsepower	15,287,832	15,732,195	10,952,187	3,857,568	922,440
Cargo capacity (short tons)	16,566,735	16,762,039	13,697,026	110,859	2,954,154
Number of passengers (cap.)	129,511	132,419	89,336	19,885	23,198
Number of railroad cars (cap.)	283	340	109	—	231
NON-SELF-PROPELLED					
Barges and scows, dry cargo:					
Number of vessels	19,772	21,876	4,334	17,345	197
Cargo capacity (short tons)	22,647,076	25,525,996	4,190,618	21,031,652	303,726
Tankers:					
Number of vessels	3,375	3,534	571	2,903	60
Cargo capacity (short tons)	7,623,498	8,201,561	1,939,872	6,117,768	143,921
Railroad car floats:					
Number of vessels	107	105	97	2	6
Number of railroad cars (cap.)	861	889	732	12	145
Total, non-self-propelled:					
Number of vessels	23,254	25,515	5,002	20,250	263
Cargo capacity (short tons)	30,270,574	33,727,557	6,130,490	27,149,420	447,647
Number of railroad cars (cap.)	861	889	732	12	145
Grand total, self-propelled and non-self-propelled:					
Number of vessels	29,328	31,666	7,657	23,270	739
Horsepower	15,287,832	15,732,195	10,952,187	3,857,568	922,440
Cargo capacity (short tons)	46,845,684	50,489,596	19,827,516	27,260,279	3,401,801
Number of passengers (cap.)	129,511	132,419	89,336	19,885	23,198
Number of railroad cars (cap.)	1,144	1,229	841	12	376

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-674

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

THOMAS W. GRIFFITH and
AMERICAN COMMERCIAL LINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI—AMERICAN COMMERCIAL LINES, INC.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-674

WHEELING-PITTSBURGH STEEL CORPORATION,

Petitioner,

v.

THOMAS W. GRIFFITH and AMERICAN COMMERCIAL LINES, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI-AMERICAN COMMERCIAL LINES, INC.

The petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered August 11, 1975, reversing the judgment of the United States District Court for the Western District of Pennsylvania entered on November 5, 1975, as amended November 21, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 521 F.2d 31. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 384 F.Supp. 230.

Question Presented

Whether the decision of the Court of Appeals is in accord with the prior case law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act relating to the liabilities of a manufacturer that employs longshoremen to load its products into a barge in its possession.

Statement of the Case

This action was commenced by plaintiff to recover for injuries sustained while unloading a barge owned by American Commercial Lines, Inc., (American) and in the possession of Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh), his employer.

On May 23, 1973, in response to an oral request from Wheeling-Pittsburgh, American delivered barge ACBL 2730 to Wheeling-Pittsburgh's Allenport dock (R. 22a).[1] Wheeling-Pittsburgh placed this barge within its fleet until it was ready to be loaded. Wheeling-Pittsburgh put lights on its fleet and, depending on its position in that fleet, would have put lights on ACBL 2730 (R. 22a, 23a).

ACBL 2730 remained with the fleet for an undetermined length of time. By the morning of May 26, 1973, however, it had been moved and secured to the river side of another barge then in position to be loaded. This movement was probably accomplished by a Wheeling-Pittsburgh employee using a rope and pulleys. If a towboat had been needed to assist in this move, Wheeling-Pittsburgh had M/V Monessen available for this purpose (R. 29a, 103a-105a).

On May 26, 1973, plaintiff—an employee of Wheeling-Pittsburgh—was a member of an eight man crew having the

[1] As in Wheeling-Pittsburgh's petition, references beginning with "R." are to the appendix filed in the Court of Appeals.

job of loading steel products produced by Wheeling-Pittsburgh into barges. Of these eight men, one, Joseph Armstrong, was an experienced riverman. Plaintiff and one other man had done this type of work on a few occasions in the past. The other five members of the crew were totally inexperienced (R. 92a).

At about 11:05 a.m. the crew to which plaintiff was assigned began to load ACBL 2730. At this time the foreman, Joseph Allfree, became aware of the fact the barge covers were difficult to move. He nevertheless allowed the work to continue, and the necessary covers were opened (R. 44a, 38a).

At approximately 2:00 p.m. Mr. Allfree directed the crew to stop loading the barge and to replace the previously opened covers to the closed position. Mr. Allfree then returned to his office (R. 39a).

Plaintiff and Joseph Armstrong undertook to close a stuck cover with the assistance of a crane operated by a third Wheeling-Pittsburgh employee. They had attached cables to the stuck cover and moved to an adjacent cover when the crane operator lifted the cables straight up. This caused the cover on which they were standing to move, precipitating both of them to the bottom of the barge (R. 87a-88a, 111a-113a).

In August of 1973 plaintiff filed the present action against Wheeling-Pittsburgh and American. Each defendant denied liability to plaintiff and cross-claimed against the other for indemnity or contribution. After all parties had engaged in discovery, American moved for summary judgment on plaintiff's claim against it and on its crossclaim against Wheeling-Pittsburgh. Wheeling-Pittsburgh moved for summary judgment on the claims made against it by both plaintiff and American. No motion was made with respect to Wheeling-Pittsburgh's crossclaim against American.

On November 5, 1974, the District Court entered an order dismissing all claims against Wheeling-Pittsburgh. In the accompanying opinion, the court found, in accord with petitioner's own designation of itself, that Wheeling-Pittsburgh was owner *pro hac vice* of ACBL 2730 at the time of the accident.[2]

On November 21, 1974, the District Court amended its order of November 5, 1974, to certify the dismissal of the claims against Wheeling-Pittsburgh as a final judgment under Fed. R. Civ. P. 54 (b). Plaintiff and American jointly appealed from that order.

The Court of Appeals reversed the District Court, holding that Wheeling-Pittsburgh could be found liable to both plaintiff and American for negligence chargeable to it in its capacity as owner *pro hac vice*. Wheeling-Pittsburgh then filed its petition for certiorari asserting, for the first time, that it cannot properly be designated an owner *pro hac vice*.

ARGUMENT

The decision of the Court of Appeals is in accord with the prior case law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act relating to the liabilities of a manufacturer that employs longshoremen to load its products into a barge in its possession.

I. Petitioner's contention that the Court of Appeals misconstrued the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act relating to plaintiff's claim does not raise an issue warranting review by this Court.

Petitioner acknowledges that the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act

[2] Wheeling-Pittsburgh so identified itself on page 14 of its brief in the District Court.

(LSHWCA) permit a longshoreman employed by the vessel to sue his employer for injuries caused by negligence other than that of persons providing stevedoring services. (Wheeling-Pittsburgh's petition at 17-18.) It is clear from both the language of the statute and the legislative history that this is correct. 35 U.S.C. §905 reads, in pertinent part:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. *If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel* ..." (Emphasis added.)

The purpose behind the emphasized provision is explained in the report of the House Committee on Education and Labor as follows:

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. *The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.* Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are

applicable to ship building or repair employees employed directly by the vessel. *The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.*" H.R.Rep. No. 92-1441, 92d Cong. 2d Sess. ____ (1972), U.S. Code Cong. & Admin. News, p. 4708 (emphasis added, footnotes omitted).

Thus, it is apparent a longshoreman who was employed by the vessel on which he was injured is precluded from suing his employer only "if the injury was caused by the negligence of persons engaged in providing stevedoring services." The longshoreman is otherwise free to "bring an action against such vessel as a third party." To deny him such an action would make his rights depend on whether he was employed by the vessel or by an independent contractor; exactly the result Congress sought to avoid.

In the same section of the amending statute that added § 905 (b) to LSHWCA, Congress enacted the definition of "vessel" now found in 33 U.S.C. § 902 (21). Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18, 86 Stat. 1263. That definition states:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and the said vessel's owner, *owner pro hac vice*, agent, operator, charter or bare boat charterer, master, officer or crew member." (Emphasis added.)

Prior to the filing of its petition for certiorari Wheeling-Pittsburgh consistently conceded it could be found to have been owner *pro hac vice* of the barge on which plaintiff was injured. 521 F.2d at 39-40. This question should not, therefore, form a basis for granting certiorari. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147n. 2(1970).

In any event, Wheeling-Pittsburgh *was* owner *pro hac vice* as that term has been understood by the courts and Congress. In

Blair v. United States Steel Corp., 444 F.2d 1890 (3d Cir. 1971), *cert. denied* 404 U.S. 1018 (1972), the Third Circuit held, on facts virtually identical to those of the present case, that a steel company having possession of a barge for the purpose of loading it with its own products could be found to be owner *pro hac vice*. Similarly, in *Eskine v. United Barge Co.*, 484 F.2d 1194 (5th Cir. 1973), the Fifth Circuit held a salt mining company (Cargill) was correctly found to be owner *pro hac vice* of a barge it was loading with its product, explaining:

> "It [the barge] was in the exclusive control of Cargill while being loaded. When loaded, it would have been moved from the dock by Cargill. The relationship was, or was analogous to, that existing under a bareboat charter. It is not clear from the record as to what the arrangement was between the barge owners and Cargill but it is clear that there was an arrangement existing under a contract, express or implied. Although the voyage of the barge on which Eskine was injured was short in both time and space, there was a movement on navigable waters to the dock, a loading at the dock and an intended movement from the dock with Cargill having, at all times, the complete and exclusive control of the barge. This being so, Cargill was the owner pro hac vice of the barge and as such liable for damages for injuries resulting from unseaworthiness." *Id.* at 1196.

No conflicting decisions from other courts of appeals have been discovered.

Contrary to petitioner's assertion, the Third Circuit does not equate owner *pro hac vice* with a simple possessor. This was demonstrated in *Rao v. Hillman Barge and Construction Co.*, 467 F.2d 1276 (3d Cir. 1972), where the court distinguished *Blair* and held a company having possession of a barge solely to repair it could not be found owner *pro hac vice*. In that opinion the circuit court also cited with approval *Miller v. Union Barge Line Corp.*, 299 F.Supp. 718 (W.D.Pa. 1969), which had similarly held that a stevedoring contractor could

not be found owner *pro hac vice*. 467 F.2d at 1277. The Third Circuit's decision in the present case will not, therefore, impose liability on the stevedoring contractors and shipbuilders and repairers the 1972 amendments were intended to protect. Possible liability rests only on manufacturers like Wheeling-Pittsburgh that have taken possession of a barge to load it with its own products.

The Court of Appeals decision thus gave perfect implementation to the intent of Congress. As noted above, the entities against whom an action will lie are enumerated in the definition of "vessel." In its section-by-section description of the amendments, the House Education and Labor Committee Report explained:

> "Vessel would be defined as any vessel upon which or in connection with which any person entitled to benefits suffers injury and including the vessel owner and others responsible for the operation of the vessel." H.R. Rep. No. 92-1141, 92d Cong. 2d Sess. ___ (1972), U.S. Code Cong. & Admin, News, p. 4719.

In the present case, Wheeling-Pittsburgh was responsible for the operation of ACBL 2730 at the time of plaintiff's accident. While a stevedoring company cannot refuse to load a barge without losing business, Wheeling-Pittsburgh was under no such compulsion. Its only concern was to see its products were given transport. It was free to reject any barge it discovered was unsafe and, indeed, had established a procedure for doing this (R. 127a-28a). Having freely decided to use ACBL 2730 to carry its goods and to expose plaintiff to the risks involved in loading it, Wheeling-Pittsburgh cannot deny responsibility for this operation. Therefore, if plaintiff was injured by any negligence chargeable to Wheeling-Pittsburgh (other than that of persons providing stevedoring services), both the language and policy of the 1972 LSHWCA amendments require he be permitted to maintain his action against Wheeling-Pittsburgh.

II. Petitioner's contention that the Court of Appeals misconstrued the prior case law and the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act relating to American Commercial Line's contribution claim against petitioner raises no question warranting review by this Court.

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court held the decision in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952), does not bar contribution in a noncollision maritime case where the tortfeasor from whom contribution is sought is not statutorily immune from liability to the injured party. 417 U.S. at 109-10. For the reasons set forth above, LSHWCA does not preclude plaintiff's negligence action against Wheeling-Pittsburgh *qua* owner *pro hac vice*. Thus, unless a jury found Wheeling-Pittsburgh's only negligence was that of persons providing stevedoring services, this case is legally indistinguishable from *Cooper* and American would be entitled to contribution.

None of the cases cited in Wheeling-Pittsburgh's petition considered the narrow exception to the general rule of employer nonliability presented in this case. None of those cases can, therefore, be considered to be in conflict with the Court of Appeals' decision in this case.

Finally, petitioner asserts the Court of Appeals' decision is in "direct conflict" with three decisions of the Fifth Circuit. (Petition at 27-28.) However, all those cases involved injuries occurring on fixed offshore platforms rather than vessels. The decisions were based on the Fifth Circuit's holdings that the right of indemnification recognized in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), did not exist in a non-vessel case,[3] and

> " '... that the Act's exclusive liability provision effectively abrogates any independent tort liability of the

[3] *E.g.*, White v. Texas Eastern Transmission Corp. 512 F.2d 486, 488 n.5 (5th Cir. 1975).

> employer to its employees, *thereby eliminating any basis which may have existed for indemnification on a tort theory.*' " *White v. Texas Eastern Transmission Corp.*, 512 F.2d 486, 489 (5th Cir. 1975) (emphasis by the court).

These cases are not, therefore, in conflict with the Third Circuit's decision in the present case. Further, the above quoted passage and the Fifth Circuit's handling of *Cooper* indicate it would agree with the Third Circuit that a right to contribution exists where, as here, the Act permits the employee to maintain an action against his employer for negligence chargeable to it in its capacity as "vessel."

Conclusion

In interpreting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, the Court of Appeals correctly perceived and implemented a narrow exception Congress made to the general rule that a stevedoring employee cannot maintain a negligence action against his employer. The issues presented are thus not of sufficient moment to warrant granting a writ of certiorari. It is respectfully submitted Wheeling-Pittsburgh's petition should, therefore, be denied.

Respectfully submitted,

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No. 75- 674

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner

v.

THOMAS W. GRIFFITH and
AMERICAN COMMERCIAL LINES, INC.,
Respondents

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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IN THE

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v.

THOMAS W. GRIFFITH and
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Respondents

Respondent's Brief in Opposition to Petition for Writ of Certiorari

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Wheeling-Pittsburgh Steel Corporation exercised sufficient possession and control over the barge on which Respondent was injured to become the owner *pro hac vice* of that barge.

2. Whether the Longshoremen's and Harbor Workers' Compensation Act insulates an entity serving in the dual capacity of vessel owner and stevedore-employer from tort responsibility for injuries to longshoremen caused by that entity's negligent exercise of its ownership duties?

COUNTER-STATEMENT OF THE CASE

On May 26, 1973, Respondent Thomas Griffith was thrown into the hold of a barge and seriously injured. The barge was owned by American Commercial Lines, Inc., and was in the exclusive possession of the Petitioner, Wheeling-Pittsburgh Steel Corporation.[1] The injury occurred because the rails upon which the barge covers rode were bent and, as a consequence, the covers did not roll freely but instead had to be forced closed with the use of cables attached to a crane.[2]

The pleadings, interrogatories and depositions of record in this case disclose that the barge had been delivered to Petitioner Wheeling-Pittsburgh Steel Corporation on May 23, 1973 and was in its exclusive possession from that date until May 28, 1973, when it was turned over to a tow-boat for delivery to another destination.[3] During the time the barge was in the exclusive possession of Wheeling-Pittsburgh Steel Corporation all movements of the barge from the upriver position to which it was first delivered, downriver to the dock where it was loaded with steel, and further downriver to the point where it was picked up by a tow-boat for delivery to its ultimate destination, were performed by Petitioner's personnel and pursuant to its direction. Moreover, Petitioner maintained a permanent river landing

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1. American Commercial Line's Answer to Complaint, Paragraph 4; and Petitioner's Answer to interrogatory No. 52 from American Commercial Lines, Inc.

2. Wheeling-Pittsburgh Steel Corporation's answers to interrogatories Nos. 11, 34, 38, 39 and 41 from American Commercial Lines, Inc.

3. Petitioner's Answers to Interrogatories Nos. 26 and 52 from American Commercial Lines, Inc.;

facility and a crew of rivermen to manuever and tend barges while in its possession. To accomplish these manuevers, Petitioner's employees use both a crane and a small landing boat.[4] The owner of the vessel gave no orders, either as to the making of any such moves nor as to the manner in which the moves or the loading of the barges should be accomplished.[5] In commenting upon the degree of control over the barge exercised by Petitioner during this period when it was in its exclusive possession, the Court of Appeals noted that "Wheeling concedes that it might be found to be an 'owner pro hac vice' as that term has been applied in this circuit." (App. A, p. 12a)

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4. Deposition of Franklin J. Merritt, p. 36-37; deposition of James Phillips, p. 8-9, 47; deposition of Roy Preston Locy, p. 3-6; deposition of Robert William Reidel, p. 19-20.

5. Indeed, the deposition of Franklin J. Merritt, maintenance supervisor for American Commercial Lines, Inc., indicates at p. 45-46 that the bargeowner could not even control Pittsburgh-Wheeling's improper, and physically damaging procedures used while its barges were in Pittsburgh-Wheeling's possession.

REASONS FOR DENYING THE WRIT

I. The Decision in This Case Will Have Minimal Impact Upon Judicial Caseloads and Will Not Be of Importance to Anyone Other Than the Parties to This Suit.

Petitioner's statements as to the importance and far-reaching impact of the issues raised by this case are as exaggerated as the reports Mark Twain had of his death.[1]

The statistics set forth in the Petition suggest the Court of Appeal's decision will enable every injured longshoreman or ship repairer to sue his employer. By implication he also suggests that this may increase the maritime caseload of the district courts some twelve-fold. However, the unambiguous language of the opinion itself gives clear evidence that no such onslaught of litigation could possibly occur.

First, the Court of Appeals made it eminently clear that only a longshoreman or ship-repairer employed directly by the vessel owner or one exercising sufficient possession and control of the vessel to qualify as an owner *pro hac vice* will be able to bring an action against his employer. Moreover, to be successful, that action must be premised upon the employer-owner's negligence in the fulfillment of its ownership function, and not in the fulfillment of its stevedoring or ship-repairing functions. As stated by the Court of Appeals:

> "The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence

1. See concurring opinion of Mr. Justice Stewart in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, at p. 608 (1975).

> of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence." App. 19a.

Thus, far from dealing with the potential litigation of some 68,000 claims by injured longshoremen, we deal only with the fraction of those total longshoring injuries sustained by longshoremen employed by the owner of a vessel and injured as the result of negligence on the part of the employer-owner in fulfilling its "owner" duties, as opposed to its stevedoring or ship-repairing duties. Petitioner discreetly gives us no indication as to what fraction of the 68,000 total longshoring injuries he lists as occurring in 1971 fit within this rather tight shoe. Common sense indicates, however, that it is a minute fraction of the whole and that the decision in this case will have little impact on judicial caseloads.

Nor does there exist any other compelling basis for granting the Writ. There is no conflict of decisions in either the Courts of Appeal or the District Courts. Moreover, the posture of this case is such that the one issue of relevance to anyone other than the parties involved may never be reached. A large part of Petitioner's argument centers around whether the degree of control over the barge ceded to it by the barge's owner was sufficient to make it the owner *pro hac vice* of the vessel. That aspect of the case, which must of necessity turn upon its own facts and will affect few other litigants, must be disposed of before any consideration can be given to the broader problem of whether the amended Longshoremen's Act permits an employee to recover damages from his employer-owner for the latter's "owner" negligence.

The issues raised by this Petition are not nearly so significant as alleged by Petitioner. And, Petitioner itself advanced a threshold argument that, if accepted, would prevent this Court from reaching the only issue raised that could have more than incidental breadth. Petitioner received a full and complete hearing of his cause in both the District Court and the Court of Appeals. Its disappointment is not sufficiently important to justify an expenditure of this Court's very limited time.

II. The Court of Appeals' Opinion Is Consistent With the Language of the Act and With the Clear Legislative Purpose to Induce Those in the Possession and Control of Vessels to Exercise Great Care Toward Longshoremen.

Petitioner has argued that as a result of the Court of Appeals' decision, the liability of stevedore-employers within the scope of the Longshoremen's Act will be expanded rather than contracted. That statement, intended to suggest that the decision is contrary to the legislative purpose, is simply not true.

Prior to the 1972 Amendments, an injured longshoreman could sue the vessel owner on the theory of unseaworthiness to recover full damages for his injuries. If the unseaworthy condition was caused by the longshoreman's employer—as was frequently the case since most of these injuries occur during the process of loading or unloading the vessel—the owner could then recover back from the employer any damages it paid to the injured employee. Thus, before the effective date of the 1972 Amendments, an employer was often held fully responsible for tort damages awarded to its injured

employees even though the Longshoremen's Act provided that the employer's liability was limited to the payment of compensation benefits.

Both the amended Longshoremen's Act and the decision of the Third Circuit in this case make it clear that this broad liability can no longer inure to the employer's detriment. It is now clear that an employee within the scope of the Amended Act cannot recover for an injury caused by the unseaworthiness of the vessel—regardless of whether the unseaworthy condition was created by his stevedore-employer or the vessel owner—and that the only remedy other than compensation benefits available to an injured longshoreman is an action against the vessel owner[2] for the latter's negligence. Moreover, since the tort rights of injured employees are expressly limited to actions against shipowners *for their negligence,* those shipowners deemed responsible for the employee's injuries cannot seek indemnification from the stevedore-employer.

Thus, it seems clear that the legislative goal of limiting the damage exposure of the stevedore-employers has been effectively achieved and that they can no longer be made to indemnify vessel owners pursuant to this Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956). Far from expanding the liability of stevedore-employers to pay damages for injuries to their employees, the opinion of the Court of Appeals makes it clear that such employers can no longer be held directly or indirectly responsible *as*

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2. That the liability of an owner *pro hac vice* is, for purposes of the Longshoremen's Act, identical to the liability of a vessel owner is made clear by 33 U.S.C. § 902 (21).

employers for payment of anything but compensation benefits.

What Petitioner really complains of, then, is not that the liability exposure of the employers *as employers* has been expanded; but that the Court of Appeals did not construe the amended Longshoremen's Act as insulating the employers from liability when they put on the additional hat of a vessel owner and, *while acting in the capacity of an owner,* negligently injure a stevedore-employee. The Court's reluctance to insulate the employer-owner from its own negligence while functioning as an owner is consistent with both the language of the amended Act and the legislative purpose.

There is no doubt that a purpose of the amended Act was to cut down the damage exposure of stevedore-employers. However, the Congress also made it abundantly clear that it was concerned about the hazards of longshoring, and that a co-equal legislative objective was to make sure that those persons responsible for the safety of longshoremen take every feasible precaution to prevent their injury. It was partially to fulfill that legislative goal that compensation benefits were increased, since it was believed that the added benefits would provide an economic inducement to employers to exercise greater care. As stated in the Report of the Senate Committee on Labor and Public Welfare, after noting that longshoring has an injury frequency rate more than four times the average for manufacturing operations:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, *by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.*" S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972), at p. 2.

But, the Committee Report makes it abundantly clear that a longshoreman's safety depends upon precautions being taken by both his stevedore-employer and those in possession and control of the vessels upon which the longshoremen must work. And, recognizing that the goal of reducing longshoring injuries depends upon owners as well as employers taking reasonable precautions, the Committee specifically rejected a contention that would have insulated the "owners" from liability, concluding:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972), at p. 10.

Thus, the legislative goal of improving the safety conditions under which longshoremen must labor can only be effectively achieved if both stevedore-employers and those in possession and control of the vessels upon which the longshoremen must labor exercise due diligence in the performance of their respective, and quite different functions. And it was clearly believed by the Congress that such joint precautions could best be achieved with the concurrent negative inducements of higher benefits

payable by the employer and tort liability chargeable to the owner.[3]

The foregoing legislative considerations, and the resultant liability of owners for longshoring injuries caused by their negligence, applies equally to situations where a single entity is both owner and employer. There is no indication that the Congress expressed any less

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3. See also H. R. Rep. No. 92-1441, 92d Cong. 2d Sess., U.S. Code Cong. and Admin. News., p. 4704 (1972); *Streatch v. Associated Container Transportation, Ltd.*, 388 F. Supp. 935, at p. 939 (C.D. Cal. 1975); and Vickery, Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 41 Ins. Counsel J. 63, at 66 (1974). All of the above authorities support the conclusion that a purpose of the amended legislation was to induce vessel owners to exercise care in the fulfillment of their ownership functions.

And see *Landon v. Lief Hoegh and Co., Inc.*, 521 F2d 756 (2d Cir. 1975). There, in the course of holding that a longshoreman could sue the vessel owner even though his injuries were caused by the joint negligence of the vessel and his employer, the Court said:

> "First, the draftsmen of section 5(b), 33 U.S.C. §905(b), could easily have inserted the word 'sole' so that the clause would have read 'caused by the 'sole' negligence of the vessel.' Nothing has been called to our attention to indicate such intention. Second, Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees." 521 F2d at 763.

Both points are applicable to the instant situation. Had Congress desired in §905(b) to distinguish between owners who are also employers and other owners, it could easily and unequivocally have accomplished that simple drafting task. But, to do so would have lessened the incentive of those employer-owners to exercise the desired high degree of care in fulfillment of their ownership functions, and would have been contrary to an important legislative goal.

concern for longshoremen injured as a result of the negligent operation of a vessel by an owner who is also an employer. In order to assure the maximum degree of safety attainable it is necessary that *both* the owner and the employer perform their respective duties in as safe a manner as is humanly possible. And, where one person—often through different divisions or with the use of different personnel—undertakes to perform both an employer and an owner function, it is no less important that he be induced to safely perform each of those disparate functions.

The amended Act expressly holds an "owner *pro hac vice*" responsible for damages it negligently inflicts upon longshoremen. Moreover, in so doing the Act specifically distinguishes between an owner *pro hac vice* and a "charter or bare boat charterer," notwithstanding that Congress must undoubtedly have been aware that the former category has been held to include those with far less incidents of ownership and control than usually is found in the latter, and that on the inland waterways of the nation an owner *pro hac vice* is one who usually functions both as the person temporarily in control of the navigational functioning of the vessel and as a stevedoring-employer. Petitioner urges that this was inadvertant. It seems far more plausible, and more in keeping with both the legislative concerns and the language of the amended Act, that this is the natural result of a desire to induce all who control the navigational mission of vessels, no matter for how short a time, to exercise great care toward those employed in the ultra-hazardous longshoring profession.[4]

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4. The conclusion reached by the Court of Appeals is consistent with the conclusion of other scholars who

have read the amended Act with awareness of the legislative concerns and goals. See Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. Mar. Law & Comm. 1, at 16 (1974) where the author states:

> "The amendment seems to intend that, although unseaworthiness actions may not be maintained in the future, negligence actions may be maintained against the employer-vesselowner by a covered employee if the injury was not caused by the negligence of persons engaged in performing stevedoring or ship repair services. For example, an employer-vesselowner would still be liable in direct negligence suits by an employee-longshoreman if a member of the crew created a dangerous condition causing the injury."

CONCLUSION

There is no indication in either the language or legislative history of the amended Longshoremen's Act that vessel owners who serve in the dual capacity of stevedore-employers are to be treated differently than any other owners. If the goals of the legislators are to be fulfilled, both categories of owners must bear equal responsibility for the consequences of their negligence as owners. Congress did not, as Petitioner argues, write an Act making all owners equal, but providing that some owners are more equal than others.

Respectfully submitted,

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